Swords in the Hands of Babes: Rethinking Custody Interviews after Troxel

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SWORDS IN THE HANDS OF BABES: 
RETHINKING CUSTODY INTERVIEWS AFTER TROXEL

CYNTHIA STARNES*  

INTRODUCTION

And the king said, Bring me a sword. And they brought a sword before the king.  
And the king said, Divide the living child in two, and give half to the one, and half to the other.  
Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it.  
Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.1

King Solomon had it easy.2 Parents with poor custodial potential do not often reveal themselves by agreeing to cut their children in half. Nor do parents fighting for custody3 often demonstrate a selfless willingness to

* Professor of Law, Michigan State University, DCL College of Law. Thanks to Craig Callen and Brian Kalt for their insightful criticisms of an earlier version of this Article, to Susan Bitensky, Mae Kuykendall, Frank Ravitch, Glen Staszewski and R. George Wright for their helpful comments and encouragement, to Judge Joan Young and Amye Warren for their expertise, and to Jane Edwards and Hildur Hanna for their excellent research support.

2. One commentator has suggested that the King may actually have been "outguessed by the woman who declared she would rather give up the child than have it cut in two." Jon Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. CHI. L. REV. 1, 6 (1987).
3. Throughout this Article, "custody" refers to primary physical custody; "custodian" and "custodial parent" refer to the parent who has primary physical custody; and "noncustodial parent" refers to the parent who does not have primary physical custody, but who usually has visitation rights. The custodian/noncustodial terminology reflects a conventional custody model. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. e (2000) [hereinafter ALI PRINCIPLES]. Even less binary models, such as the shared parenting and joint custody models urged by social workers, continue in practice the traditional maternal custodian/parental visitation model. See Martha Fineman, Dominant Disclosure, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 HARV. L. REV. 727, 731-34 (1998). For a discussion of the ALI's recently proposed custody model, see infra notes 251-66 and
sacrifice their own interests in order to protect their children. More commonly, parents appear equally fit and equally willing to sacrifice the child’s immediate well-being, thrusting her into the crossfire of custodial war in the hope of winning the right to possess her.6

Into this perilous setting steps the State, commissioned to save the child from her would-be protectors. The State’s goal is twofold: (1) protect the child’s ultimate welfare by basing custody on the child’s best interests;7 and (2) shield the child from unnecessary trauma during the custody battle.8 Neither goal is easily accomplished. Hoping to inject accompanying text.

4. See id. at 2-3 ("[T]here usually is no rational basis for preferring one parent over another.").

5. Numerous commentators have analogized custody disputes to warfare. See, e.g., Jonathan W. Gould, Conducting Scientifically Crafted Child Custody Evaluations 145 (1998) ("A majority of divorced fathers viewed the divorce as a ‘battle’ in which there was a winner and a loser. The clearly identified enemy was the former wife."); Richard Wolman & Keith Taylor, Psychological Effects of Custody Disputes on Children, 9 Behav. Sci. & L. 399, 407 (1991) ("The adversarial viewpoint presumes a zero-sum game mentality according to which one parent ‘wins’ and one parent ‘loses’ and the child loses one parent in the process.").

6. Fortunately, most custody cases are settled without litigation. In a study by Maccoby and Mnookin, only four percent of 933 families with minor children required a custody hearing. Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody 137–38 (1992). In some of these settled cases, however, one parent may have extracted economic concessions from the other by wielding a Solomonic sword, knowing that “a parent truly interested in the welfare of a child will give up almost anything to protect the child, and thus the threat of enforced joint custody can be used to extract unwarranted concessions.” Taylor, 508 A.2d at 974; see also Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981) ("[T]he primary caretaker parent . . . will be willing to sacrifice everything else in order to avoid the terrible prospect of losing the child in the unpredictable process of litigation.").


The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child’s parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
(4) the child’s adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

8. This potential for trauma is significant. As one commentator observed, “[a]ny judge or trial lawyer, any forensic psychiatrist or other mental-health specialist will affirm that child custody is, indeed, the ugliest of all litigations.” Melvin G. Goldzband, Consulting in Child Custody: An Introduction to the Ugliest Litigation for
determinacy into the open-ended best-interests custody standard, legal actors have begun increasingly to rely on the child's custodial preference as a proxy for her best interests. In an effort to ascertain this preference without subjecting the child to the trauma of courtroom testimony, most states authorize courts to interview children in camera. Good intentions notwithstanding, these custody interviews pose considerable risk to children, to their parents, and to the State's best-interests quest. These risks take three forms: (1) process risks (a child's increased entanglement in custody conflict); (2) information risks (a custody decision based on a child's inaccurate statements and unreasonable preferences); and (3) outcome risks (a child's burdensome sense of responsibility for the custody choice).

These risks increase dramatically when in-camera interviews serve as tools for searching out preferences that have not been publicly volunteered; when children's preferences are given very weighty or dispositive effect; and when the state denies parents an opportunity to challenge the accuracy and reasonableness of their children's statements. The U.S. Supreme Court's decision in Troxel v. Granville increases the urgency of a reassessment of these custody practices. Troxel's reaffirmation of the significance and breadth of parental rights strengthens parents' claim that procedural due process entitles them to access their children's in-camera statements. While such parental access reduces information risks, it greatly increases already-high process risks for

MENTAL-HEALTH PROFESSIONALS, at ix (1982). Judges are not immune from the stress this ugliness fosters. As one Michigan judge observed, a judge assigned only custody cases, will "either have a nervous breakdown or else he won't do a good job." Frederica K. Lombard, Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study, 17 U.C. DAVIS L. REV. 807, 812 n.31 (1984).

9. For a brief review of preference statutes, see infra notes 31–33 and accompanying text. For a brief summary of the best-interests critique, see infra Part III.

10. See ALI PRINCIPLES, supra note 3, § 2.14 cmt. a. While the Latin derivation of “in camera” suggests a definition limited to “in chambers,” the term is often used in a broader sense. As one court explained:

The meaning of the word “chambers” varies with the context in which it is used. It may mean a room adjacent to a courtroom in which a judge performs the duties of his office when his court is not in session. The word “chambers” is also commonly used in a different sense. When a judge performs a judicial act while the court is not in session in the matter acted upon, it is said that he acted “in chambers” whether the act was performed in the “judge's chambers,” the library, at his home, or elsewhere.

People v. Valenzuela, 66 Cal. Rptr. 825, 829 (Cal. Ct. App. 1968) (citing Von Schmidt v. Widber, 34 P. 109 (Cal. 1893); In re Lux's Estate, 35 P. 341 (Cal. 1893)).

11. States disagree as to whether and under what conditions parents should have access to a record of the interview. See ALI PRINCIPLES, supra note 3, § 2.14 reporter's notes cmt. a; see also infra Part II.B.3.a.


13. See id. at 65–66.
children, and counsels careful attention to the context and consequence of preference interviews.

Abdicating the custody decision to a child is an unacceptable response to the inadequacies of the best-interests standard. If this standard creates a decision-making vacuum, as critics have charged, it should either be abandoned or it should be refined, as the American Law Institute (ALI) has recently proposed. The ALI model offers a compelling alternative to the nebulous best-interests standard by apportioning custodial responsibility according to pre-divorce caretaking. If modified to make the child’s preference dispositive only in extraordinary cases, this model would better enable judges to determine custody, lessening their temptation to unwisely abandon the decision to a child.

Indeed, Solomon’s wisdom lay partly in the fact that he did not hand the sword to the child. Had the King been persuaded by contemporary notions of custody wisdom, the classic parable might be quite different:

*And the king said, Bring me a sword. And they brought a sword before the king.*

*And the king said, Deliver the sword into the child’s hands so that she may pierce the heart of the parent she loves least.*

*Then spake the child, for her bowels yearned for both her parents, “O my lord, do not ask me to kill either one or the other, for I love them both the same.”*

Part I of this Article briefly surveys preference practices, considers their costs and benefits, and urges a retreat from preference-driven interviews and preference-determinative custody decisions. Part II considers parental demands for access to children’s in-camera statements, and concludes that although such parental access increases risks for children, procedural due process favors it. Part III suggests that the law’s increasing willingness to delegate the custody decision to children stems partly from failure of the open-ended best-interests custody model, and advocates substitution of a modified version of the ALI’s more determinant approximation standard. This modified ALI model would allow a reformulation of in-camera interviews as opportunities for children to engage in free narrative, more fully empowering their speech while freeing them from the burdens of painful choice.

14. Numerous commentators have attacked the best-interests standard for its indeterminacy, a concern briefly explored infra Part III.

15. See infra Part III.

16. For this perspective, I am indebted to my colleague, Frank Ravitch, Professor of Law, Michigan State University, DCL College of Law.
Swords in the Hands of Babes

I. TELL US WHO YOU LOVE MOST

"Whom do you like better, your mother or your father?"
"I like them the same."
"Well, don't you maybe like one of them the teeniest bit better than the other?"
"No, I like them both the same. Exactly the same."
"What would happen if you did like one of your parents better than the other?"
"But I don't."
"But let's just say you did."
"But I don't."
"Well, what would happen to some other kid whose parents were divorced and he liked one of his parents better than the other?"
"The parent he didn't like best wouldn't like him."
"What would they do?"
"They wouldn't love him anymore."

A. Preference-Based Decision-Making

Asking children to choose their custodian has not long been the custody practice. Under ancient Roman law, fathers had an absolute right to custody of their children, whom the law viewed as their father's property. English law adopted this rule of paternal right, as did some early nineteenth-century U.S. courts. Early on, however, U.S. courts endorsed a best-interests-of-the-child custody model, an indeterminate standard that generally aims to identify the parent more likely to further the child's well-being. The difficulty of applying this vague standard to the

18. The rule of absolute paternal preference dates at least from the days of ancient Rome, when a father had a right to sell or even to kill his children. Ira Mark Ellman et al., Family Law 613 (3d ed. 1998). Under Roman law, the father's will was dispositive. "[N]o amount of cruelty, neglect of duty or immorality on his part, affected in the slightest degree his claim to the custody of his children." Id. at 614 (quoting Forsyth, Custody of Infants 8 (1850)). Paternal entitlement survived even death, enabling a father to choose another male to serve as custodian in his stead, notwithstanding the objection of the child's mother. Kathleen Nemechek, Note, Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go, 83 Iowa L. Rev. 437, 440 (1998).
20. Ellman et al., supra note 18, at 614.
21. For a brief summary of the many critiques of the best-interests standard, see infra note 247. While not precisely a definition, the ALI states that the primary objective of
complex task of choosing a child's custodian inspired courts to rely on numerous heuristics, among them the "tender years" doctrine, an assumption that nature intends young children to be with their mother. Notwithstanding its tenuous analytic foundation, the tender years doctrine dominated custody decision-making through much of the twentieth century. What thus began as a rule of absolute paternal preference under Roman law evolved into a rule of absolute maternal preference in U.S. law, at least in cases of children of "tender" years. Throughout this history of custody decision-making the child's status remained that of a prized chattel, whose perspectives were far less important than the right to possess her.

In the 1960s and 1970s, coincident with the women's movement, legal actors began to reexamine the gendered basis of custody decision-making. Its proposed model, to serve the child's best interests, is facilitated by:

(a) parental planning and agreement about the child's custodial arrangements and upbringing;
(b) continuity of existing parent-child attachments;
(c) meaningful contact between the child and each parent;
(d) caretaking relationships by adults who love the child, know how to provide for the child's needs, and place a high priority on doing so;
(e) security from exposure to conflict and violence;
(f) expeditious, predictable decisionmaking and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

ALI PRINCIPLES, supra note 3, § 2.02(1).

22. See JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY, at xi-xii (1989) (describing the comparable work of child custody investigators and noting that the difficulty of making arrangements for a child's custody leads some investigators to "make custody decisions badly" and many others to "fall back on convenient presumptions to avoid making decisions at all").

23. ELLMAN ET AL., supra note 18, at 614. In his 1968 treatise, Professor Clark reported that "the courts have adopted a rule of thumb or presumption that the welfare of a child of 'tender years' is normally best served by placing him in the custody of his mother." HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.4, at 585 (1968).

This maternal preference, explained one court, "needs no argument to support it because it arises out of the very nature and instincts of motherhood; nature has ordained it." Krieger v. Krieger, 81 P.2d 1081, 1083 (Idaho 1938). For an example of the "tender years" doctrine, see Klein v. Klein, 11 N.W. 367 (Mich. 1882) (finding reversible error in award of custody of three-year-old boy to father under former Michigan statute giving mother custody of young children).

24. For a critique of the legal tradition treating children as parental property, see Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents' Rights, 14 CARDOZO L. REV. 1747, 1809-12 (1993) (observing that "[t]hemes of individualism, private enterprise, and parental rights of ownership mark our history and survive in our state laws of custody").

25. See Nemechek, supra note 18, at 440. Critics of maternal preference have objected to its tendency to reinforce the notion that "taking care of children is a woman's job." Elster, supra note 2, at 10. But see Fineman, supra note 3, at 768-69 (urging
In 1970, the Uniform Marriage and Divorce Act (UMDA), shunning the gender-biased tender years doctrine, included an intuitively-appealing and gender-neutral best-interests factor: “the wishes of the child as to his custodian.” By 1977, sixteen states made the child’s preference a mandatory consideration, by 1998, thirty-eight states had child preference statutes. Even in states whose statutes do not expressly mention the child’s preference, courts may consider it as a factor supplementing the non-exhaustive statutory list of relevant factors.

While states generally agree that the child’s preference is relevant to custody, they vary considerably in the weight accorded that preference. A small number of states leave both the decision to consider preference and the determination of its appropriate weight wholly to the discretion of individual judges. Most states require courts to consider the preference of a sufficiently-mature child, but leave the maturity question and the weight of the mature child’s preference to judicial discretion.

recognition of women’s continuing role as primary caretaker as a significant factor in custody decision).

26. The tender years doctrine has been abolished in virtually all states. ELLMAN ET AL., supra note 18, at 615. Its remnants are not altogether absent from our jurisprudence however. See, e.g., DeCamp v. Hein, 541 So. 2d 708, 710 (Fla. Dist. Ct. App. 1989) (“[W]e do not believe the [tender years] doctrine has been totally abolished. For example, a six-month-old baby being nursed by her mother should obviously be in her mother’s custody, unless the judge found her unfit.”); see also Eric G. Andersen, Children, Parents and Nonparents: Protected Interests and Legal Standards, 1998 BYU L. REV. 935, 943-44 (“[D]espite its death and burial as a matter of black-letter law, the maternal preference persists, at least as an empirical matter.”).

27. UNIF. MARRIAGE & DIVORCE ACT § 402(2), 9A U.L.A. 282. Unfortunately, the UMDA’s use of the word “his” injects the appearance of gender bias into what is clearly a gender-neutral concept. The UMDA did not originate the practice of considering the child’s preference, which can be traced to the mid-1800s. See Lombard, supra note 8, at 810 (citing, as an example, State v. Smith, 6 Me. 462 (1830)).


30. Although the Virginia custody statute, for example, does not expressly list the child’s preference as a factor, ninety percent of Virginia judges in one survey “reported that the preference of a child aged fourteen and older was either dispositive . . . or extremely important.” Elizabeth S. Scott et al., Children’s Preference in Adjudicated Custody Decisions, 22 GA. L. REV. 1035, 1045-46, 1050 (1988).


32. See, e.g., CAL. FAM. CODE § 3042(a) (West 1994 & Supp. 2003); FLA. STAT. ANN. § 61.13(3)(i) (West 1997 & Supp. 2003); ME. REV. STAT. ANN. tit. 19-A, § 1653(3)(C) (West 1998); MICH. COMP. LAWS ANN. § 722.23(3)(i) (West 2002); OHIO REV. CODE ANN. § 3109.04(B)(1), (B)(2)(b) (Anderson 2000); VA. CODE ANN. § 20-124.3(8) (Michie 2000); see also ALI PRINCIPLES, supra note 3, § 2.08 reporter’s notes cmt. f; Nemechek, supra note 18, at 452-57. Many of these state statutes are patterned after the
states make preference dispositive when the child has reached a designated age and the parent is not unfit. 33 Even in jurisdictions in which preference is not dispositive, trial courts who have failed to consider the wishes of even pre-adolescent children have occasionally been reversed on appeal. 34 Since the 1970s, custody law has focused more and more myopically on the child's wishes. 35

Concerned that children, already distraught by the breakup of their family, not be subjected to the trauma of open testimony and cross-examination, 36 the UMDA 37 and most of the states that consider preference authorize courts to ascertain the child's preference during an in-camera interview. Unfortunately, in its infatuation with preference, the

UMDA language, which provides that a court "shall consider" the child's wishes but leaves the weight of that preference to the discretion of an individual judge. See Unif. Marriage & Divorce Act § 402, 9A U.L.A. 282.


35. See Randi L. Dulaney, Comment, Children Should Be Seen and Heard in Florida Custody Determinations, 25 Nova L. Rev. 815, 819 (2001); see also Nemeckek, supra note 18, at 459–60.

36. See Burghdoff v. Burghdoff, 239 N.W.2d 679, 682 (Mich. Ct. App. 1976) ("[A] child... who most likely has already undergone the agony inherent in the breakup of a family unit, should not be subjected to the additional pain of having to testify in open court and be cross-examined."); Lincoln v. Lincoln, 247 N.E.2d 659, 660 (N.Y. 1969):

It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them. But see Jethrow v. Jethrow, 571 So. 2d 270, 273 (Miss. 1990) (ruling that parent may call child as a witness in divorce litigation).

37. Section 404(a) of the Uniform Marriage and Divorce Act provides:
The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.


38. ALl PRINCIPLES, supra note 3, § 2.14 reporter's notes cmt. a.
law has too often assumed that the privacy of the judge’s chambers and the State’s good intentions can adequately protect children from any peril posed by the preference question itself. This assumption requires testing.

B. The Wisdom of Asking

A child is not a rag doll, to be tossed in a corner, her perspectives ignored while a judge decides which parent should take her home. The issue, however, is not whether children should have a voice when their custody is at issue, but rather the proper scope and significance of that voice. Simply put, should the State invite a child to choose her custodian? The ALI recently warned that “[g]iving great weight to the preference of a child . . . can raise significant difficulties.” Although the ALI ultimately endorses a version of preference-based decision-making, its observation suggests a need to carefully consider the costs and benefits of the preference question.

1. POTENTIAL COSTS

Asking children to express a custodial preference poses three risks: (1) process risks (a child’s increased entanglement in custody conflict); (2) information risks (a custody decision based on inaccurate statements of fact and unreasonable preferences); and (3) outcome risks (a child’s burdensome sense of responsibility for the custody choice).

a. Process Risks: Trauma to the Child

No matter how respectful or how careful a judge may be, the process of interviewing a child draws her deeper into the custody conflict. Already caught up in a whirlwind of anger, uncertainty, and fear, the child is

39. As Wallerstein, Lewis, and Blakeslee observed: Lawyers speak up for what parents want but no one speaks for the child. . . . [H]er wishes, her preferences, how she feels about the proposed plans, and how she wishes to spend her time separate from each parent are considerations that are hardly ever raised. In our current system, a child is treated like a rag doll that quietly sits wherever it is placed.


40. ALI PRINCIPLES, supra note 3, § 2.08 cmt. f; see also id. § 2.14 cmt. b (“Declining to give a greater role to the child’s perspective reflects some caution about soliciting their preferences—caution based on their immaturity, their unreliability, and the burdens placed on them when they are asked to choose between parents.”).

41. For a discussion of the ALI proposal, see infra Part III.

42. Numerous commentators have described the stress of children whose parents are divorcing, among them Jonathon Gould:

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confronted by a powerful stranger who wants her to talk about a family breakup she may be struggling to deny. While an in-chambers conversation surely is less stressful for children than testimony on the witness stand, the setting of the conversation cannot fully protect children from the cost of the conversation itself. Asking children to choose between their parents places a tremendous burden on them.

The adults on whom the child has relied for guidance and nurturance have proved mysteriously unable to answer the critical question of who should take care of her, and so the fate of the family has fallen into the child's hands. There is no win-win solution for the child, for each custody choice presents an undesirable outcome: choose mom and disappoint dad, choose dad and disappoint mom.

Children are deeply affected by the breakup of their family. Their lives are profoundly altered by the anger, disappointment, and failure that characterize their parents' marital breakdown. The child feels a loss of control over his or her environment. Suddenly, there is a group of strangers with whom they must talk, tests to take, and a judge who talks about choosing between mommy and daddy.

GOULD, supra note 5, at 3; see also Daniel C. Schuman, The Unreliability of Children's Expressions of Preference in Domestic Relations Litigation: A Psychiatric Approach, 14 MASS. L. REV. 14 (1984) ("[F]amily litigation is one of the great stresses which can impact a child."); Judith Wallerstein, The Long-Term Effects of Divorce on Children: A Review, 20 J. AM. ACADEMY CHILD & ADOLESCENT PSYCHIATRY 349, 350 (1991) ("[D]ivorce is unlike any other seemingly similar life experience for a child, such as parental loss through death, in being specifically rooted in failure of the relationship between the man and the woman who modeled for the child the reliability of love and commitment.").

43. See GOULD, supra note 5, at 3 (observing that children of divorce “want their parents to stop pretending to be mad at each other and to live together again”).


45. As one attorney observed:

[Conversation] in the judge's chambers, where it is most often heard, is traumatic to any child, at almost any age. The mere suggestion that the child might have to testify against a parent creates a state of apprehension that may not end until long after the divorce is over.

JAMES T. FRIEDMAN, THE DIVORCE HANDBOOK: YOUR BASIC GUIDE TO DIVORCE 31 (rev. ed. 1999). Friedman is the former president of the prestigious American Academy of Matrimonial Lawyers. Id. at About the Author; see also Joan B. Kelly, Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice, 10 VA. J. SOC. POL'Y & L. 129, 154 (2002) (observing that "from a clinical perspective, being interviewed in chambers is a formidable and inherently stressful experience for most school-aged youngsters").

46. See ALI PRINCIPLES, supra note 3, § 2.14, cmt. b (noting the “burdens placed on [children] when they are asked to choose between parents”); Schuman, supra note 42, at 14 ("Choosing one parent over another for a child as a pass/fail situation is a huge burden."). For a discussion of the child's sense of responsibility for the custody outcome, as opposed to her stress over the custody question, see infra Part I.B.1.c.
or choose dad and disappoint mom. The child may thus feel “despair, depression and guilt” as she experiences “a step in the direction of one parent . . . as a betrayal of the other.” And she may believe the judge is encouraging her “to behave in a disloyal manner by stating a preference for one parent over the other.” Posing the preference question indirectly rather than directly may reduce, but will not eliminate the child’s stress, for even the immature child will understand that her conversation with the judge is related to the custody battle and consequently that her statements, especially any expressly negative statements about a parent, may jeopardize a parent’s chance for custody.

Children who are already experiencing loyalty conflicts may become further stressed and confused when their parents tell them “opposing truths.” Each parent’s attempt to convince the child of her merit and the other parent’s inadequacy creates cognitive dissonance for the child who struggles to integrate the views of each parent’s valued but inconsistent view. The significance of the child’s decision increases her experience of dissonance.

47. Id. at 830 (quoting Judith S. Wallerstein & Joan Berlin Kelly, Surviving the Breakup: How Children and Parents Cope with Divorce 49, 88 (1980)); see also Robin Drapkin & Florence Bienefeld, The Power of Including Children in Custody Mediation, 8 J. Divorce 63, 66 (1985) (“Young children of ten fear they will be made to say bad things about Mommy and Daddy.”).

48. Lombard, supra note 8, at 836.

49. In the analogous context of custody mediation, Robert E. Emery observed: In [some] cases, the children who I interviewed were frozen with fear, afraid . . . of saying anything that could be construed as taking sides with one parent and against the other. I did not see children who felt “empowered” by my attempt to give them a voice; I saw children who felt burdened by being asked, however gently or cleverly, to choose between their parents.

Robert E. Emery, Easing the Pain of Divorce for Children: Children’s Voices, Causes of Conflict and Mediation Comments on Kelly’s “Resolving Child Custody Disputes,” 10 Va. J. So. Pol’y & L. 164, 167 (2002). The ALI suggests, however, that “[t]he risks of involving children in disputes for which they may feel personally responsible may be diminished by ascertaining their preferences indirectly.” ALI PRINCIPLES, supra note 3, § 2.08 cmt. f.

Children, for example, might be asked “about what they like to do with each parent or how time is spent when they are together, rather than with whom they want to live.” Id. § 2.14 cmt. b. Reliance on indirect questioning not only suffers from an over-optimism about children’s inability to understand the point of these questions, but also exacerbates already-high communication problems between judge and child, leading a judge to misinterpret a child’s oblique statements and to inaccurately identify a supposed preference. For a discussion of communication challenges, see infra Part I.B.1.b.(i).

50. See Schuman, supra note 42, at 15.

51. Cognitive dissonance describes the discomfort associated with contemplation of two inconsistent sets of facts or choices. See generally Leon Festinger, Conflict, Decision and Dissonance (1964); Leon Festinger, A Theory of Cognitive Dissonance (1957). As Wolman and Taylor explain:

One of the most pathogenic dynamics of the typical child custody dispute is that in which the child becomes the object of intensive lobbying by parents who feel
Under these circumstances, children are not likely to experience their decision-making authority as empowering, but rather as an awful burden. Children who are unable or unwilling to answer the preference question may experience a sense of disempowerment driven by the failure to accept an invitation of control. On balance, "the very act of expressing a preference may be contrary to the child's best interest."

b. Information Risks: Inaccurate Fact-Finding

A private conversation between a judge and child offers much normative appeal. Caring and careful, intuitive and wise, the judge will talk with the child on the courthouse steps, over ice cream perhaps, searching out the child's preference, her perspectives and other information relevant to custody. Informed by this conversation, the judge will then make a better custody decision. At least, that's the way the story goes. Unfortunately, the reality may be very different, as a child, stunned and bewildered by the disintegration of her family, caught up in the trauma of compelled to convince him or her of their own innocence, their spouse's guilt or their view of life in general. The child has few defenses against this dynamic. One who protests, who expresses doubt or skepticism to a parent, may be berated for betrayal; one who is not so accused may view himself or herself as a traitor.


52. In the context of child clients, Professor Buss has given the term "empowerment" a two-part definition:
At its most concrete, empowerment means enabling clients to exercise direct influence over the litigation process and indirect influence over litigation outcomes. At a more abstract level, empowerment means enabling clients to influence the way in which they are perceived by judges, lawyers, other parties, and as a consequence, themselves.


53. As Professor Buss observed, "children's emotional and psychological development renders them uniquely dependent upon their parents, which undermines their ability to experience the exercise of control over decisions negatively affecting either parent as a good." Buss, supra note 52, at 944.

54. See id. at 942.

55. Schuman, supra note 42, at 14.

56. As Jonathan Gould explains:
Most children do not expect their parents to divorce, even when they live in homes in which their parents are continually fighting. They are stunned and upset when their parents separate. Their whole world has been turned upside down, their security and safety have been seriously threatened, and they are afraid of the unknown—the future without two parents. The exception is children from high-conflict families, who may be relieved that the repeated, intense conflicts between their parents have mercifully been put to an end. Even
custody litigation, and intimidated by the judge and her surroundings, endures an interrogation by a judge who is well-intentioned but unschooled in child development or interview technique. The judge poses a series of closed questions,\textsuperscript{57} "inadvertently misleading the child, distorting her answers, and subtly suggesting responses consistent with the judge's bias"\textsuperscript{58} in a conversation too swift to allow either the judge or the child to collect her thoughts.\textsuperscript{59} The judge then bases custody on misinformation, mistakenly favoring the "less-worthy" parent and perhaps even imperiling the child's ultimate well-being. While most cases probably fall somewhere in between this idyllic vision and worst-case scenario, it would be a mistake to assume that children's in-camera statements are entirely trustworthy or that a judge will invariably spot unreliable statements in a conversation that lasts less than twenty minutes.\textsuperscript{60} Both the child's statement of preference and her statements otherwise relevant to custody pose serious information risks.

(i) The preference question: I like \underline{mom} / \underline{dad} best

Information risks begin with the child who cannot or will not state a clear preference.\textsuperscript{61} Indeed, "the proposition that a child, who is going
through one of the most emotional and trying experiences in his or her life, can briefly and clearly relate a viewpoint on a custodial preference to a virtual stranger (the judge) may not be realistic." Some children will simply refuse to choose between their parents, sometimes because their affection and need for each parent is in equipoise or because they deny any need to choose, hoping against hope that their parents will "stop pretending to be mad at each other" and "kiss and make up." Other children will in fact prefer one parent but be reluctant to express that preference for fear of disappointing the nonpreferred parent. Judges may be hard-pressed in a brief conversation to distinguish between the child who is reluctant to express her preference and the child who has no preference.

For the judge who succeeds in searching out the child’s preference, more is required, as the preference must be tested for its consistency, its voluntariness, and its reasonableness. Little would be gained, for example, by ascertaining a strongly-held but fluctuating preference, which "depend[s] upon whether the child is asked [on] Monday or Wednesday." For some children, inconsistency will be more immediate, as stress and immaturity produce apparently contradictory preferences at the same time and place. If consistency is defined as "steadfastness but flexibility amid changing circumstances," rather than rigidity, then a child’s polarized position on preference may demonstrate "paralyzing anxiety" rather than consistency. The truly consistent preference is thus one that "occupies the broad middle ground between circumstantial ricochet and obstinate monomania." Identifying such a preference requires a longitudinal observation not possible in a single in-camera observation.

Even when preference is consistent, it may not be voluntary, that is, it may not be the product of the child’s free will. At worst, the child will
base preference on a "fear of reprisal" by a parent who has directly threatened her with physical or emotional punishment.\textsuperscript{71} More often, parents will engage in less overt coercion,\textsuperscript{72} as their children fall victim to the "lollipop syndrome," preferring the parent who showers them with goodies and good times;\textsuperscript{73} the "rescue syndrome," preferring the parent perceived to be the "weaker" of the two;\textsuperscript{74} or the "reconciliation syndrome," attempting to reconcile parents by basing preference on a hope that the nonpreferred parent will abandon the divorce.\textsuperscript{75}

\textsuperscript{71} See Molloy, 637 N.W.2d at 805; BLACK & CANTOR, supra note 22, at 45 ("It is far from seldom that children will not give their true choice, because they fear a parent's retribution . . .").

\textsuperscript{72} See ALI PRINCIPLES, supra note 3, § 2.08 reporter's notes cmt. f ("A child's preferences will be discounted, or disregarded, where it appears to be the result of pressure by one of the parties, by counsel, or by another.").

\textsuperscript{73} As one court explained: "The so-called 'lollipop syndrome' relates to the situation where one parent . . . may shower the child with gifts and pleasant times, and impose no discipline in order to win the child's preference." Taylor, 508 A.2d at 973 n.12. Massachusetts judges, in a 1982 survey, cited a "fear of bribery by parents" as one explanation for their reluctance to rely on a child's preference. See Nemechek, supra note 18, at 461 & n.195. For an example of the lollipop syndrome in operation, see Leo v. Leo, 213 N.W.2d 495 (Iowa 1973) (noting that child preferred dad who allowed him to drink alcohol and view "go-go girls" in his nightclub).

One commentator has argued, however, that attempts to "'unduly influence' the child's choice" by "showering attentions on the child during the divorce period . . . should be encouraged rather than lamented." Kandel, supra note 33, at 372 (citation omitted). Professor Kandel's example of undue influence, "spending quality time in shared activities or providing extra help with homework," however, not only excludes the "go-go-bar" cases, but also overlooks the strategic nature of such attentions and their consequent impermanence, which may come as a surprise to the child seduced by them. Id. Professor Kandel further reasons that children are "unlikely" to be "fooled" by parental attempts to buy a child's affection and that "[t]he undue influence of financial inducement can be curtailed during the divorce period through pendente lite support orders." Id. at 372-73.

While Professor Kandel is surely correct in her observation that many children are surprisingly adept at detecting insincerity, children are, after all, children, who are by definition developmentally disparately positioned and therefore vulnerable to the adults who attempt to manipulate them.

\textsuperscript{74} See Taylor, 508 A.2d at 973 n.12 (describing rescue syndrome). Parents may cultivate this image of weakness in order to win the child's favor. As one commentator explained, "[t]he mother who says, 'Who will take care of me if you don't live with me?' or the father who says, 'I guess you will never see me again after the divorce,' is in effect trying to manipulate the children into expressing a custodial preference out of pity." FRIEDMAN, supra note 45, at 33. When this manipulation succeeds, its consequences may be very harmful to the child, for "[i]f children choose to live with the pitiful parent, they often play the part of parent and assume many burdens that are inappropriate to their age or stage of development." Id.; see also Dr. Alayne Yates, Child's Preference—Developmental Issues, 10 FAM. ADVOCATE 30, 33-34 (1998) (observing that a child who assumes the role of parent may eventually display "resentment in self-defeating or self-destructive ways").

\textsuperscript{75} Lombard, supra note 8, at 828.
Even when the child’s preference is consistent and voluntary, it may be “unreliable, short-sighted or irrational.”\(^7\) A child’s ability to form a reasonable preference depends on her cognitive maturity, that is, her ability “to perceive and to comprehend current reality by sorting out some elements of truth from other elements of truth.”\(^7\) The child’s immaturity, stress, and loyalty conflicts may prevent her from sorting out truths on which to base preference. When able to express a preference, even a more mature child may panic and make a rash decision in the hope of escaping further involvement in the custody battle.

Other children will consciously mislead the judge,\(^7\) using an expression of preference as a means to punish a strict disciplinarian or a parent they blame for the divorce. Other children will be motivated by a “fear [of] losing utterly a parent whom they don’t prefer,” or by a desire to be with the financially better-positioned parent or the parent who “gives more freedom.”\(^7\) Sometimes the basis for the child’s preference will be clear enough, but reasonable minds will differ as to whether that basis is reasonable. In the commonly occurring case, for example, in which a child bases preference on a dislike for a parent’s new partner, courts disagree over whether such a preference is reasonable.\(^8\)

Judicial efforts to flush out a preference and to verify its consistency, voluntariness, and reasonableness are complicated by the difficulty of communicating with children whose perceptions, language, memory,

\(^7\) See ALI PRINCIPLES, supra note 3, § 2.08 cmt. f. The ALI expresses caution about soliciting children’s preferences “based on their immaturity [and] their unreliability,” id. § 2.14 cmt. b, but ultimately supports accommodation of the “firm and reasonable preference of a child who has reached a specific age,” id. § 2.08(1)(b). The ALI’s reliance on “reasonable” preferences reflects the practice in some states. See, e.g., MICH. COMP. LAWS. ANN. § 722.23(i) (directing court to consider the “reasonable preference of the child, if the court considers the child to be of sufficient age to express preference”). Numerous commentators have noted the unreliability of children’s preferences. See, e.g., Jones, supra note 61, at 52 (“[C]hildren under emotional stress may provide distorted images of their parents and the situations existing in their families, their feelings may be transient, the reasons for their custodial preferences may be worthy of no weight at all.”); Wallace J. Mlyniec, A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose, 64 FORDHAM L. REV. 1873, 1886-87 (1996) (relaying warning of Massachusetts family court judge that “children’s expressed preferences should not be taken at face value since children improperly assess their own long-term interests, rely on unrealistic expectations and promises, and may manipulate or be manipulated by parents”).

\(^7\) Schuman, supra note 42, at 15.

\(^7\) See ALI PRINCIPLES, supra note 3, § 2.08 cmt. f (noting that a child may “wish to mislead the interviewer”).

\(^7\) BLACK & CANTOR, supra note 22, at 45; see also Linda Whobrey et al., The Best Interests of the Child in Custody Disputes, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES AND EXPERTISE 59, 75 (L. Welthorn ed., 1987) (“The child may choose the more lenient party, the party whose bribe seems most attractive, or one party in order to strike out at the other.”).

\(^8\) See ALI PRINCIPLES, supra note 3, § 2.08 reporter’s notes cmt. f.
attention span, and moral values differ significantly from those of the judge. Judges' best efforts to communicate are compromised by their lack of training in child interview techniques and by children's susceptibility to suggestion and misleading questions. Judges may be unaware that their conversation is encouraging certain responses, or that they are distorting and misinterpreting the child's answers to confirm their own biases. Matters are made worse when judges do not invite free narrative, instead posing a series of forced-choice questions, which increase the likelihood of inaccurate responses. Moreover, judges may

81. See Jones, supra note 61, at 59; see also Schuman, supra note 42, at 15 (“Children's reports of events and relationships, and their unwilling use of words which may convey misleading implications, often stem from childhood status . . . .”). See generally Jones, supra note 61, at 58–68 (discussing communications difficulties posed by children's immaturity).

82. As Joan Kelly observes:

[J]udges are not trained in child interviewing skills, and generally lack knowledge about developmental differences in cognitive, language, and emotional capacities. Thus, it is hard for even the most experienced judge to place children's responses in an appropriate context and evaluate the weight that should be given to their wishes.

Kelly, supra note 45; see also Warren & Marsil, supra note 57, at 147 (“[I]nterviewer training is effective in reducing problematic questioning techniques only when training is both intensive and extensive, and only when it includes practice, individualized feedback, and follow-up.”).

83. See Warren & Marsil, supra note 57, at 128–29 (noting that children are generally more suggestible and more likely to be misled than adults). The judge's status as an authoritative figure may increase her potential to mislead suggestible children. See FAIGMAN ET AL., supra note 57, § 14-2.3.3, at 178 (“Older, more knowledgeable interviewers are able to mislead children more than low status adults or peers.”). A judge's entreaty to the child to be honest and careful will not fully buffer the child against suggestion. See Warren & Marsil, supra note 57, at 139-40 (noting that warnings reduce but do not eliminate suggestibility).


85. As-Jonathan Gould explains, “[c]onfirmatory bias refers to the tendency to look for data that support your expectations.” GOULD, supra note 5, at 233. Gould cites as an example the case of a mother's allegation that the father had a drinking problem, which an evaluator confirmed on the basis of a single 9:00 a.m. phone conversation with the father whose speech sounded slow and “slurred.” Id. at 233–34.

86. For a brief description of the distinction between invitational questioning and closed questioning, see supra note 57.

87. Researchers universally recommend that interviews begin with open-ended “invitational” questions. Warren & Marsil, supra note 57, at 144. Faigman, Kaye, Saks, and Sanders explain the problem of forced-choice questions:

[When details requested in a specific question are not available in the child's memory, the child may attempt to answer the question anyway. Second, responses to specific questions mask poor comprehension as children can adopt
erroneously assume an informal interview will enhance truth-finding by increasing the child’s comfort level, although researchers have observed that “the more friendly and trusting an interviewer is, the more eager the child may be to provide answers that the interviewer wants to hear.”

The difficulties of identifying a child’s preference are not limited to cases of very young children. Some studies suggest that even adolescents are significantly more suggestible than adults. And older children, like younger children, may experience the ambivalence and loyalty conflicts that impede their ability to state a clear preference. Even cognitively-mature adolescents may be socially immature and thus easily persuaded by peers, preoccupied with immediate rather than long-term consequences, and driven by perceptions of immortality that impede accurate risk assessments.

Nevertheless, while age may not guarantee the legitimacy of a preference, an older child surely deserves more deference than a very young child. Indeed, “at some age, children become developmentally strategies to cover up their limitations, such as repeating back phrases or words used by the interviewer, providing a stereotypical response, or providing affirmative answers to yes/no questions even if they do not understand them.

FAIGMAN ET AL., supra note 57, § 14-2.3.7, at 183.

88. FAIGMAN ET AL., supra note 57, § 14-2.3.3, at 179. The authors also note, however that “the more at ease the child feels, and the more he or she understands the purpose and ‘ground rules’ of the interview, the more likely the child is to provide information that is accurate, detailed, and relevant.” Id. § 14-2.3.6, at 182 (citation omitted).

89. See Warren & Marsil, supra note 57, at 128 (noting findings that “suggestibility generally declines over the school years but that even adolescents can be significantly more suggestible than adults,” but also noting other studies showing that “under certain conditions, older children and adults can be more suggestible than younger children”).

90. When loyalty conflicts do arise, older children may be unaware of them. As Professor Buss observes, “[e]ven a child mature enough to understand the uniqueness and privacy of his own mind may lack the sophistication to appreciate the conflicts and ambiguity in his views.” Buss, supra note 52, at 928.

91. FAIGMAN ET AL., supra note 57, § 14-2.6.5, at 199-200.


93. As the ALI observes, “the preferences of older children are more likely to conform to their best interests than those of younger children.” ALI PRINCIPLES, supra note 3, § 2.08 cmt. f. In a study of Virginia judges, Scott, Reppucci, and Aber found that the impact of the child’s preference increased with the child’s age; while most judges considered the preference of a child under age six irrelevant, almost ninety percent of judges afforded the preference of children age fourteen or older great or dispositive weight. Scott et al., supra note 30, at 1049-50; see also GOULD, supra note 5, at 245 (reporting that child custody evaluators gave significant weight to the wishes of a child over the age of fifteen, "considered the wishes of 10-year-olds," and "paid little attention to the wishes of 5-year-olds"); Carol R. Lowery, Child Custody Decisions in Divorce Proceedings: A Survey of Judges, 12 PROF. PSYCHOL. 492, 492-93, 495 (1981) (reporting that eighty-six percent of
indistinguishable from adults." The problem lies not so much in this normative concept as in its practical application. When are children developmentally able to choose? Does this readiness require only the ability to think rationally, or does it further require the ability to engage in abstract thinking, to contemplate a range of hypotheticals? Is cognitive development sufficient, or should social development also be relevant? Is it possible to identify a bright-line age of presumptive ability to choose? Numerous commentators believe it is possible. Drawing on the work of child psychologist Piaget and others, commentators have drawn the "old-enough" line at various points. Professor Kandel, for example, believes the preference of a child age six or older should be dispositive, at least in cases where both parents are fit. Dean Lombard urges that only children

Kentucky judges surveyed considered the preferences of children age twelve and older more important than the preferences of younger children; Thomas J. Reidy et al., Child Custody Decisions: A Survey of Judges, 23 FAM. L. Q. 75, 78, 79 tbl.2, 83, 84 tbl.5 (1989) (survey of California judges). But see Nemechek, supra note 18, at 460–61, 461 n.186 (reporting that 115 Indiana judges surveyed consistently ranked child's preference as unimportant compared with other custody factors).

94. Buss, supra note 52, at 903 (reciting argument of guardian ad litem school).

95. See id. at 903–04 (noting arguments that while the typical seven-year-old can think rationally, the ability to think abstractly may be delayed until adolescence).

96. For an argument that cognitive function should not alone determine decision-making competence, see generally Scott et al., supra note 92, at 222–35.

97. Jean Piaget, among others, has tracked children's development through a series of stages of moral and cognitive maturity. Professor Mlyniec provides a helpful overview of Piaget's stages: Level One (birth to age two)—children develop the ability to "plan simple physical tasks using objects"; Level Two (ages two to seven)—children develop the ability to think logically; Level Three (ages seven to eleven)—"children begin to understand causation, gain a more objective view of the universe, and attain a better understanding of other's perceptions"; Level Four (ages eleven to fifteen)—children develop the ability to "imagine the past, present, and future conditions of a problem and create hypotheses about what might logically occur." Mlyniec, supra note 76, at 1879. Professor Mlyniec concludes that under Piagetian theory, children age fifteen and older are capable of "adult thought." Id. But see Elizabeth S. Scott, Judgment and Reasoning in Adolescent Decisionmaking, 37 VILL. L. REV. 1607, 1632 (1992) (questioning the sufficiency of empirical data to support adolescents' ability to make decisions as well as adults).

98. Kandel, supra note 33, at 369 (arguing that the preference of children age six and older should be given dispositive effect, at least where parents are both fit). According to Kandel, "[a]t about the age of six years, cerebral changes take place which result in increased physical and cognitive capacities, enabling children to think more deeply and logically, and to simultaneously keep track of many aspects of a situation." Id. at 363 (citation omitted). Kandel does not dispute, however, that "[d]evelopment (like 'adjustment') is sensitive to context, environment, and individual variation, so that general theories cannot explain the individual case." Id. at 362.

age *twelve* and older should be interviewed.\(^9\) Professor Mlyniec maintains that the preference of a child under age *ten* should be given no weight, but that the preference of a child age *fourteen* and older should be controlling “after an informed consent dialogue.”\(^10\) The ALI implicitly suggests, by way of example, age “11, 12, 13, or even 14 as the appropriate age” at which the firm and reasonable preference of a child should be accommodated.\(^11\) Even as the ALI encourages state-wide rules setting forth a specified age, however, it is careful to note that since “maturity develops gradually rather than all at once . . . no single age will either identify all mature minors or exclude all immature ones.”\(^12\) While disagreement among legal actors about the appropriate age of choice does not itself prove the impossibility of line-drawing, it does suggest that identifying this age may be more arbitrary than one would like to believe. However unfortunate, the truth may be that “[d]evelopmental psychology does not offer what lawyers would most like: definitive, fixed information upon which to ground simple, age-based rules.”\(^13\)

It is much easier, of course, to finesse the “old-enough” question by delegating it to an individual trial judge on a case-by-case basis. The rationale is that children progress toward rationality and autonomy at different rates,\(^14\) and thus no categorical definition of maturity is possible. While many current statutory schemes follow this model,\(^15\) it is no

\(^9\) Lombard, *supra* note 8, at 837 (citing the difficulties of communicating with preteens and social science findings that preteens experience more intense loyalty conflicts than older children).

\(^10\) Mlyniec, *supra* note 76, at 1907-08. In Professor Mlyniec’s view, the preference of a child between ages ten and fourteen should also be controlling after an informed consent dialogue if the child’s competence is first established by an expert. *Id.* at 1908.

\(^11\) ALI PRINCIPLES, *supra* note 3, § 2.08 cmt. f.

\(^12\) *Id.*

\(^13\) Buss, *supra* note 52, at 919.

\(^14\) Gould, *supra* note 5, at 117 (observing that while a child’s “social, emotional and cognitive psychological functioning . . . interact with chronological age . . . there are substantial individual differences among children”).

\(^15\) See, e.g., ALASKA STAT. § 25.24.150(c)(3) (Michie 1995) (“[C]ourt shall consider . . . the child’s preference if the child is of sufficient age and capacity to form a preference[,]”); CONN. GEN. STAT. ANN. § 46b-56(b) (West 1995) (“[C]ourt shall . . . be guided by the best interest of the child, giving consideration to the wishes of the child if the child is of sufficient age and capable of forming an intelligent preference . . . .”); HAW. REV. STAT. ANN. § 571-46(3) (Michie 1999) (requiring the court to consider preference of a child “of sufficient age and capacity to reason, so as to form an intelligent preference”); NEB. REV. STAT. ANN. § 42-364(2)(b) (Michie 1999) (“[C]ourt shall consider . . . the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning[,]”); VA. CODE ANN. § 20-124.3(8) (Michie 2000) (“[C]ourt shall consider . . . preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference[,]”).
panacea. Most obviously, it simply begs the maturity question by delegating it to an individual decision-maker with a busy docket and little or no training in child development.\textsuperscript{106}

(ii) Free narrative: there is something else you should know.

Even when the judge is seeking only the child’s preference, the child may spontaneously reveal other information relevant to the child’s best interests. Custody statutes often include in their list of relevant factors: the relationship and interactions between parent and child; a party’s ability to direct the child’s education and upbringing, and to provide the child with physical care; the existence of an established environment; the moral fitness of the parties; the child’s adjustment to her home and community; the mental and physical health of the parties; a party’s willingness to facilitate a continuing relationship with the other parent; and any domestic violence.\textsuperscript{107} It is difficult to imagine much of a conversation between judge and child that would not in some way relate to these broad-based factors.

\textsuperscript{106} As Professor Mlyniec observes, “when judges determine that a child is mature or intellectually capable of making decisions, the factors considered in reaching those decisions frequently do not reflect the accumulated research about child development.” Mlyniec, supra note 76, at 1903–04.

\textsuperscript{107} See, e.g., Mich. Comp. Laws Ann. § 722.23. The Michigan statute requires the court to consider:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

\textit{Id.}
Even a brief interview is likely to generate information relevant to custody, both as a judge initially attempts to put the child at ease, and later as she attempts to gauge the reasonableness of an expressed preference. Indirect preference questioning, often urged by commentators, is almost certain to draw relevant information from the child in addition to preference.

Sometimes the child's statements are significant indeed. Many of the judges in Dean Lombard's survey, for example, reported that during the preference interview they obtained information about "mistreatment or abuse, including sexual misconduct, by a parent or her live-in friend, as well as information pointing toward drug or alcohol abuse by the custodial parent."108

What is a judge to do with such information? It is unrealistic and probably inappropriate to insist that judges ignore it. While most judges are unlikely to take a child's statements at face value, inaccuracies produced by a child's stress, by a parent's manipulation or coaching, or by a judge's unskilled communications are not always apparent. Yet if the child's statements are kept confidential, their credibility is untested, even when their impact on custody is significant. The "substantial probability that judges receive inaccurate information" in preference interviews111 makes information risks a serious concern indeed.

c. Outcome Risks: Blaming the Child

In addition to process and information risks, preference-driven decision-making creates serious outcome risks for children. As the ALI observed, "[c]hildren may feel responsible for the outcome of a custody dispute if they believe they have participated in its resolution, whatever

108. See Lombard, supra note 8, at 814 ("[I]n many cases, judges received information that went well beyond the child's preference, whether they sought it or not."). As a Michigan court observed:
Assuming arguendo that the child is able to express a preference, the interview should not take place in a vacuum. Inquiry must be made in order to test the authenticity, the motives, and the consistency of the preference. Often a good interview will result in information that affects other child custody factors and therein lies the problem.
Molloy, 637 N.W.2d. at 805-06.

109. See, e.g., ALI PRINCIPLES, supra note 3, § 2.08 cmt. f ("Generally speaking, the preferences of a child, even when relevant, should not be directly solicited. The risks of involving children in disputes for which they may feel personally responsible may be diminished by ascertaining their preferences indirectly."). Even indirect questioning imposes process costs on children. See supra Part I.B.1.a.

110. Lombard, supra note 8, at 814 (reporting that fifty-four percent of the judges surveyed obtain such information during the in-camera interview).

111. Id. at 817.
that might be.\textsuperscript{112} These outcome costs may persist long after the stress of
the interview has passed. As the child’s sense of the significance of her
preference increases, so does her sense of responsibility. When the child
understands that her preference will be dispositive, her burden is onerous.
Especially hard-hit is the child whose preference is expressed only
privately to the judge, but is publicly revealed by the custody outcome,
which parties understand to be preference-driven.

In addition to an unwanted sense of responsibility, the child may
experience the hurt, disappointment, or even the wrath of the losing parent
who blames her for loss of the custody battle. When the losing parent has
coached the child prior to the preference interview, the loss of custody may
trigger suspicion that the child has not only rejected her, but betrayed her,
a suspicion not likely to enhance the noncustodial parent-child
relationship.\textsuperscript{113} Even as the losing parent is blaming the child, the child
may be blaming herself, especially when the custody arrangement she
chose proves disappointing.\textsuperscript{114}

Outcome costs are not averted when the court invites the child’s
choice but does not award custody in accord with that choice. In such
cases, the child may feel unimportant, as if her wishes are too insignificant
to be honored.\textsuperscript{115} And as the child takes up residence with the non-
preferred parent, she may experience daily the guilt of disloyalty and the
resentment of the non-preferred parent. Outcome costs may thus be a
largely unavoidable consequence of asking children to choose between
parents, whether or not their choice is honored.\textsuperscript{116}

Given the risks of burdening the child with guilt for the custody
decision, of compounding the child’s stress, and of obtaining inaccurate
information from the child, is it really wise to invite the child to express a
preference? Answering this question first requires consideration of the
potential benefits of preference-based decision-making.

\textsuperscript{112} \textit{ALI PRINCIPLES}, supra note 3, § 2.08 cmt. f. \textit{But see} Kandel, supra note 33,
at 367 (observing a lack of supporting research for the assumption that allowing children to
choose their custodian produces guilt and stress).

\textsuperscript{113} For this insight I am indebted to Joan E. Young, Chief Circuit Judge, Oakland
County Sixth Circuit Court, Michigan.

\textsuperscript{114} \textit{See} \textit{ALI PRINCIPLES}, supra note 3, § 2.08 cmt. f (“Children whose preferences
are followed may feel responsible for the consequences, whether that be their own
unhappiness or that of a parent.”).

\textsuperscript{115} \textit{ALI PRINCIPLES}, supra note 3, § 2.08 cmt. f (“Children whose preferences are
not followed may come to believe that the court considered them unimportant or
ineffective.”); \textit{see also} Kandel, supra note 33, at 367 n.313 (“The child may reason the
judge’s failure to grant his wish indicates that his opinion is foolish and immature. The
child may suffer a decrease in self-esteem, and/or disillusionment with the legal system.”).

Professor Kandel argues that this consequence could be avoided by a rule that gave
dispositive effect to the “preference of any child over the age of six years.” \textit{Id.} at 301.

\textsuperscript{116} For a discussion of process costs, see supra Part I.B.1.a.
2. POTENTIAL BENEFITS

Giving children a voice in their custody furthers the fundamental principle that parties significantly affected by litigation should have "the opportunity to be heard." This principle is not reserved for adults only. Increasingly, the law views the transition from childhood to adulthood, not as a bright line, but rather as a gradual progression, during which children become more and more deserving of adult rights. Adolescents are especially entitled to some degree of autonomy, a theme at least as old as In re Gault. Principles of fundamental fairness make a powerful case

117. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914) (internal quotation marks omitted)); see also Lombard, supra note 8, at 812 (describing this opportunity as "the most cogent justification" for considering a child's preference).

118. See Scott et al., supra note 30, at 1061 (observing that "[t]he law increasingly gives minors the liberty to make decisions which directly or indirectly restrict the authority of their parents and the state"); see also Kandel, supra note 33, at 305 (discussing "the protectivist/patienthood paradigm which assumes the incompetency and delicacy of the child, and the empowerment/personhood paradigm which envisions the child as a developing (legal) person"). Kandel has argued that enabling children to choose a custodian offers the additional benefit of facilitating children's maturation, which "prepares them to be responsible citizens of a democracy." Id. at 367. This argument is persuasive, however, only for children who are already mature enough to express a reasoned preference. The maturation-facilitation argument is much less persuasive in the case of children whose immaturity will be "treated" by inflicting upon them the hugely onerous burden of choosing a custodian. While an immature child may indeed mature greatly if the responsibility for the custody decision is imposed upon her, the costs of this practice may well exceed the gains. While a learn-through-your-mistakes approach might make sense in the case of preference for clothes or friends or summer vacations, it is much less sound when the issue is as hugely important as with whom the child will live. Giving children power to make significant choices before they are developmentally ready is a risky proposition.

for giving children, especially older children, an opportunity to speak to a matter as significant to them as the identity of their custodian.\textsuperscript{120}

Preference-based decision-making also offers normative appeal, as it furthers the movement toward private ordering in family law.\textsuperscript{121} No-fault divorce laws offer a striking example of this deference to private decision-making in their provision for divorce-at-will and usually notwithstanding the protest of the other spouse.\textsuperscript{122} Spouses also enjoy broad freedom to determine the economic consequences of their divorce.\textsuperscript{123} Even the custody decision is left largely to private ordering, though it is generally reviewable, at least in theory, by a court to ensure the child’s best interests are protected.\textsuperscript{124} When parents are unable to reach a private agreement

\textsuperscript{120} This principle is consistent with Article 12 of the 1989 Convention on the Rights of the Child, which requires that children have an opportunity to participate in legal proceedings. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 168, U.N. Doc. A/44/49 (1989). The United States, however, has not ratified the Convention. See Kelly, supra note 45, at 148. Some commentators complain that children too often remain voiceless and after the divorce “would be startled to learn that the courts were ever seriously concerned with their interests.” Wallerstein et al., supra note 39, at 312. The authors claim that the “court system has unintentionally contributed to the suffering of children” by allowing parents to speak for children “just as those who fight bloody holy wars allegedly speak in the name of religion.” Id. at 302. This absence of children’s independent voice may partly explain the perception of numerous critics that the law too often protects parents at the expense of their children. See, e.g., Woodhouse, supra note 24, at 1748-49.

\textsuperscript{121} See Scott et al., supra note 30, at 1061. For a recent discussion of the move toward private ordering in family law, see David D. Meyer, Self-Definition in the Constitution of Faith and Family, 86 MINN. L. REV. 791, 796-804 (2002).

\textsuperscript{122} Although not usually expressly acknowledged, most states in effect recognize a unilateral right to divorce without a showing of fault. Ellman et al., supra note 18, at 206–07. Professor Dolgin has observed that the underlying deference to individual autonomy evident in these no-fault laws is curiously inconsistent with “traditional understandings of children as treasured, innocent and vulnerable.” Dolgin, supra note 119, at 351.


\textsuperscript{124} See ALI PRINCIPLES, supra note 3, § 2.06 reporter’s notes cmt. a (stating traditional rule that parental agreement concerning children requires judicial review, but acknowledging that “agreements are rarely rejected on other grounds”). One study reported that of 349 settlement agreements, only one agreement was rejected by a court. Marygold S. Melli et al., The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce, 40 RUTGERS L. REV. 1133, 1145 (1988). The ALI supports an expressly deferential approach, requiring courts to adopt a parental agreement unless it is “not knowing or voluntary, or would be harmful to the child.” ALI PRINCIPLES, supra note 3, §
regarding custody, some commentators have reasoned that their disqualification allows the child to replace them as private decision-maker.125

Commentators have further argued that deference to the child’s preference offers the additional benefit of furthering the child’s best interests, since the parent to whom the child is most attached is likely to be the parent most attached to the child, and consequently the parent who would best provide for the child.126 This argument, however, assumes the child’s expression of preference is reasonable and not the product of adult manipulation, a dubious assumption in contested custody cases.127 What is clear is that pragmatism requires deference to the fiercely-held preference of a mature child, since a custody arrangement such a child opposes is not likely to be workable.128

An additional reason to invite children to express a preference is that while speaking to the preference question, they may provide other relevant and valuable information.129 Sometimes this additional information is

2.06(1)(a)-(b).
125. Scott et al., supra note 30, at 1062.
126. See, e.g., Stephen G. Gilles, Parental (and Grandparental) Rights After Troxel v. Granville, 9 SUP. CT. ECON. REV. 69, 97 (2001) (suggesting that rough generalization that “the parent with the greater attachment to the child is likely to be the parent to whom the child has the greater attachment . . . simplifies the court’s task so much that the reductions in litigation costs exceed any reduction in accuracy”). Gilles’ greater-attachment rationale could be furthered more prudently by a primary caretaker presumption that supposes the parent who has spent the most time with the child is the parent most attached to the child and therefore the best custodian. See infra notes 251–55 and accompanying text.
127. For a discussion of parental efforts to sway the child’s preference, see supra notes 71–74 and accompanying text.
128. As the ALI acknowledges, “it is often unrealistic to expect a court-ordered arrangement will work well when an older child is firmly opposed to it.” ALI PRINCIPLES, supra note 3, § 2.08 cmt. 1; see also Lombard, supra note 8, at 811 (observing that “trial judges generally agree that it is crucial for the court to ascertain the preferences of older children” and citing by way of example the teenager who frustrates the custody order by leaving home).
129. As the ALI observed:
[I]nformation [from the child’s perspective] may be helpful in ascertaining whether a parental agreement should be reviewed by the court . . . whether the child of a certain age has firm and reasonable preferences that should be taken into account . . . whether there is a gross disparity in the abilities of the parents or the strength of the emotional relationships between the parent and the child . . . how well the child has adjusted to a temporary custodial arrangement . . . or whether there exists one of the factors requiring special protective measures . . .
ALI PRINCIPLES, supra note 3, § 2.14 cmt. b. Even when information is “available from other sources, the court may decide that the child may have a useful perspective on such matters that others cannot provide.” Id; see also Lombard, supra note 8, at 810 (reporting view of surveyed judges that interview with child “gave them a ‘feel’ for the case they would not otherwise have” (footnote omitted)).
otherwise unavailable, either because parents strategically withhold it or simply because the child is the only party with knowledge of the facts.\footnote{130} While the child's statements require some form of credibility testing, her "ingenuousness and propensity to speak forthrightly"\footnote{131} may open doors to other significant information that would otherwise be unknown. In a circuitous way, asking children to state their preference thus enables the State to hear other valuable things they have to say. This tenuous rationale raises an obvious question: Why not invite the child's free narrative rather than direct her speech through preference questions?

\section*{3. TAKING BACK THE SWORD}

Children deserve a voice in the crucial issue of their custody. Accordingly, when children speak to issues that concern them, judges should listen, whether or not their statements convey a preference.\footnote{132} When a mature child publicly expresses a strongly-held preference or spontaneously volunteers such a preference during an in-camera interview, a judge should listen carefully indeed. But as most parents ordinarily understand well enough, listening is not the same as asking. Children who do not express a preference should not be asked, directly or indirectly, to do so.\footnote{133} Indeed, if the ALI is correct, the preference question is largely unnecessary, since "in most cases, children with firm preferences will find
a way to make those preferences known without significant effort by those involved in the case."134

Even when a child volunteers a firm and reasonable preference, that preference should not determine custody, except in extraordinary cases.135 Delegating the custody decision to children imposes tremendous process and outcome costs on them and represents a misguided abdication of judicial responsibility “masquerad[ing] in the guise of free speech” for children.136

Children deserve more than a preference interview. They deserve an opportunity to speak broadly to issues that concern them, free of option-posing questions designed to flush out any unexpressed preference. Preference interviews should thus be recast as opportunities for free narrative, empowering children to speak freely without burdening them with unwanted choice. As children define the scope of their conversation, their sense of well-being137 and satisfaction with the custody outcome are likely to increase,138 even when they do not control that outcome.139 Redesigning in-camera interviews as invitations to free narrative rather than preference-driven searches and declining to make the child’s

134. ALI Principles, supra note 3, § 2.08 cmt. f. Black and Cantor have observed that parents do not normally litigate cases in which “the child has a pronounced preference and is near majority.” Black & Cantor, supra note 22, at 42. Assuming that children do not hide strongly-held preferences and that parents do not normally litigate cases involving mature children with strong preferences, custody interviews in litigated cases may thus serve only to uncover preferences that are too weak or too immature to warrant deference.

135. See infra Part III. Black and Cantor cynically capture the irony of delegating the custody decision to children by noting that this practice allows “children [to] determine their custody when those same children would not be allowed to decide what they should have for dinner.” Black & Cantor, supra note 22, at 45.

136. Schuman, supra note 42, at 18. In Schuman’s view, forcing children to make the custody decision denies children their “basic rights . . . to guidance, nurturance and a civic education in the graduated exercise of rights and responsibilities of free speech and liberty.” Id. at 19.

137. Lombard, supra note 8, at 810–11 (suggesting the importance of allowing a child “an opportunity to vent her feelings about the perplexing and anxiety provoking situation in which she finds herself” but noting that few judges in her survey “seemed enamored of this ‘social work’ potential”).

138. See Katherine Hunt Federle, Looking Ahead: An Empowerment Perspective on the Rights of Children, 68 Temp. L. Rev. 1585, 1604 (1995) (arguing that a child’s participation in neglect proceedings increases the likelihood of her satisfaction with the outcome).

139. See Leonard P. Edwards & Inger J. Sagatun, Who Speaks for the Child? 2 U. Chi. L. Sch. Roundtable 67, 74 (1995) (arguing that a child whose view is presented to the judge will experience empowerment whether or not her view controls the outcome). But see Buss, supra note 52, at 942 (“When listening to children reflects caring but not deference, and when children experience adult listeners as respectful but uninfluenced, children may feel valued but not empowered.”).
preference dispositive except in ordinary cases will significantly reduce process and outcome risks for children.

Taking back the custody sword will not, however, resolve the serious problem of information risks posed by confidential in-camera conversations. If children are to continue to have a voice in custody proceedings, information they convey in-camera that is not disclosed to parents during trial will continue to pose a serious risk that judges will base custody on inaccurate information. Parental demands for access to children’s in-camera statements thus deserve serious attention.

II. PROTECTING PARENTS’ RIGHTS

Please don’t take my sunshine away.

Jimmie Davis

When parents fight each other for physical custody of their children, the stakes are huge. One parent will win the right to control the child’s upbringing and to determine the extent of parent-child contact; the other parent will lose that right. Parents are willing to pay an enormous price to win physical custody, subjecting themselves and their children to the “ugliest of all litigation.” Rules of war and norms of fair play are thwarted, parents insist, when judges interview children in chambers, withhold children’s statements from parents, and then rely on those statements to choose a custodian. Not fair and not acceptable, say parents.

Prudence surely requires that children’s in-camera statements undergo some form of accuracy testing if they are to be weighed in the custody decision. The question here is whether the Constitution requires that

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140. **JIMMIE DAVIS, You Are My Sunshine** (Decca Records 1940). Davis wrote this song prior to his two terms as Governor of Louisiana.

141. This characterization describes a traditional custody model in which one parent is the “sole custodian” and the other parent is the noncustodian, ordinarily with visitation rights. Fineman, *supra* note 3, at 731–33. As Professor Fineman explains, even less binary models, such as the shared parenting and joint custody models urged by social workers, continue in practice the sole maternal custody/paternal visitation model. *See id.* at 733–34.

142. **GOLDZBAND, supra** note 8, at ix. Wolman and Taylor have suggested that parents may actually not know what they are getting into when they embark on custody litigation. *See Wolman & Taylor, supra* note 5, at 406 (“Parents contesting custody most often enter the legal process naively and with little realistic preparation for the personal and financial stress associated with an undertaking of such magnitude.”).

143. The perception of fairness, or lack thereof, may have an important consequence, as parents who suspect unfairness “are more likely to engage in strategic, resentful or uncooperative behavior, from which children may suffer; conversely, when parents believe that rules are fair, they are more likely to invest themselves in their children and to act fairly toward others.” **ALI PRINCIPLES, supra** note 3, § 2.02 cmt. b.
parents serve as accuracy-testers. The crux of parents’ claim is that the Fifth and Fourteenth Amendment due process guarantees' entitle them to custody procedures that are fundamentally fair, and to an opportunity to challenge the veracity and context of their children’s in-camera statements that undercut their claim for physical custody. Such parental access could be in the form of a transcript, videotape, or other record of the interview, which would be made available to parents during trial. Whether due process entitles parents to such an opportunity to challenge their children’s in-camera statements depends on two questions: (1) Is process constitutionally due a parent during custody litigation? and (2) If so, what process is due?

A. The Parental Claim to Fundamental Fairness

Parents’ claim to fundamental fairness depends initially on a determination that inter-parental custody litigation is subject to the requisites of the Due Process Clause. The Supreme Court has made clear that “[t]he requirements of procedural due process apply only to deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” Does a parent’s loss of physical custody deprive her of such a protected liberty interest?

The Supreme Court has long recognized that parents have a fundamental right to the “companionship, care, custody, and management” of their children. This right, “far more precious than any property right,” “is perhaps the oldest of the fundamental liberty interests recognized by [the] Court.” Were the setting a termination proceeding

144. U.S. Const. amend. V (“[N]or shall any person . . . . be deprived of life, liberty, or property without due process of law . . . .”); U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .”).

145. For a discussion of these and other options, see infra Part II.B.3.

146. See Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 24 (1981) (“[D]ue process . . . expresses the requirement of ‘fundamental fairness’ . . . .” (citation omitted)).


148. CHEMERINSKY, supra note 147, § 7.3.3, at 545.


150. 530 U.S. at 65 (plurality opinion). In Troxel, Justice O’Connor gave the following historical account of parental liberty interests in childrearing:
rather than a custody dispute, the role of due process would be plain enough. Unlike parents facing termination, however, parents involved in a custody dispute do not ordinarily risk total loss of parental rights, an important distinction the Court has drawn in some termination cases.

More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” . . . We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944) . . . . “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.* at 166.

. . . *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements’” (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”); *Quilloin v. Walcott*, 454 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Glucksberg*, supra, at 720 (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[s] . . . to direct the education and upbringing of one’s children” (citing *Meyer* and *Pierce*)).

530 U.S. at 65–66 (plurality opinion) (alterations in original).


152. *See*, e.g., *M.L.B.*, 519 U.S. at 121 (“In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is ‘irretrievable[ly] destruct[ive]’ of the most fundamental family relationship.” (alterations in original) (quoting *Santosky*, 455 U.S. at 753)); *Lassiter*, 452 U.S. at 39 (“A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child’s religious, educational, emotional, or physical development.” (footnote omitted)).

Dean Lombard has argued, however, that in the case of a young child, a noncustodial parent who has a very limited visitation order may suffer a loss that “approaches termination.” *Lombard*, *supra* note 8, at 821. From the child’s perspective, a custody order may resemble a termination order in relation to the losing parent. *See* JOSEPH GOLDSTEIN ET
Though not as dramatic as a termination of the parent-child relationship, a loss of physical custody may occasion a substantial reduction of the noncustodial parent's liberty interest in directing her children's upbringing, overseeing their daily care, and determining with whom they associate. In Troxel, a plurality of the Court stressed this parental associational right to determine when and with whom children will spend their time, finding constitutionally impermissible a grandparent visitation order to which a parent objected. The parental right to make associational decisions is clearly at risk in traditional custody litigation, for loss of physical custody is fundamentally a loss of the right to determine not only the extent of the child's contact with third persons, but, far more significantly, the extent of contact with the noncustodial parent herself.

153. See Zakrzewski v. Fox, 87 F.3d 1011, 1014 (8th Cir. 1996) (observing that noncustodial father's "liberty interest in the care, custody, and management of his son has been substantially reduced by the terms of the divorce decree and Nebraska law"); see also M.L.B., 519 U.S. at 141-42 (Thomas, J., dissenting) (expressing concern that the majority's ruling that the State must fund a record on behalf of an indigent parent who appeals termination of her parental rights will extend to other cases in which fundamental rights appear to be at stake and citing a "custody determination" as an example of one such case).

154. 530 U.S. at 66, 73 (holding that grandparent visitation order unconstitutionally infringed parental decision-making). The Troxel story began with a visitation dispute between the mother and grandparents of two children. Id. at 60-61. The grandparents sought judicial intervention, invoking a Washington statute that authorized a court to order nonparental visitation when, in the court's view, it served the best interests of the child. Id. at 61. Apparently striking a compromise between mother and grandparents, the trial court ordered grandparent visitation of "one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays." Id. The unhappy mother appealed and, ultimately, the Washington Supreme Court determined the visitation statute unconstitutionally interfered with the mother's right to raise her children. In re Custody of Smith, 969 P.2d 21, 31 (Wash. 1998), aff'd sub nom., Troxel, 530 U.S. 57. On appeal to the U.S. Supreme Court, a plurality found the Washington statute unconstitutional as applied. Troxel, 530 U.S. at 75. In a heavily nuanced opinion, a plurality of the Court found the Washington statute "breathtakingly broad," effectively allowing any third party to subject a parent's visitation decision to state-court second-guessing, and according a parent's wishes absolutely "no deference." Id. at 67. For helpful discussions of Troxel, see generally Dolgin, supra note 119, and Gilles, supra note 126.

155. Traditional custody litigation engages a binary focus in which one parent (the custodian) wins and the other parent (the noncustodian) loses the child's physical custody. Even in less binary custody models, such as the one recently proposed by the ALI, one parent ordinarily has primary responsibility for children's daily care, thus continuing in practice the traditional custodian/noncustodian model. See Fineman, supra note 3, at 731-34.
Relegated to court-ordered visitation or the goodwill of the custodial parent, the noncustodial parent’s right to her child’s companionship is infringed, sometimes dramatically, sometimes hardly at all, but virtually always. This is the peril posed by custody litigation, and it is substantial. Although the noncustodial parent’s loss may not be quantifiable, it is unmistakable. Even when she retains the right to participate in important decisions affecting the child, the noncustodial parent often loses the day-to-day contact important to creating parent-child bonds. This lost opportunity for the closeness that comes from daily intimate association is likely to be irreversible in terms of relationship-building. As Justice Blackburn once observed, “[s]ome losses cannot be measured.”

The Court has distinguished custody proceedings from termination proceedings not only on the basis of totality, but also on the basis of irreversibility. Although custody decisions are viewed as less permanent than termination proceedings, and therefore less deserving of due process protections, custody orders tend to be much more permanent in practice than the language of modification statutes suggests. As the ALI recently observed, a custody decision is “expected to be final.” The essential source of this finality is the belief that children benefit through continuity

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156. See Lombard, supra note 8, at 823.
157. Santosky, 455 U.S. at 760 n.11 (termination proceeding).
158. In other contexts, the Court has found that even a temporary deprivation may violate procedural due process guarantees. See, e.g., Connecticut v. Doehr, 501 U.S. 1, 12 (1991) (“[O]ur cases show that even the temporary or partial impairments to property rights . . . are sufficient to merit due process protection.”); see also Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (“The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property.”).
159. M.L.B., 519 U.S. at 121 (“In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is ‘irretrievable’ of the most fundamental family relationship.” (alteration in original)) (quoting Santosky, 455 U.S. at 753)); Lassiter, 452 U.S. at 39 (“A termination of parental rights is both total and irrevocable.” (emphasis added)).
160. The traditional standard for modification is a subsequent, unanticipated and “substantial change in circumstance” that warrants a change in custody in order to ensure the best interests of the child. See ELLMAN ET AL., supra note 18, at 704.
161. ALI PRINCIPLES, supra note 3, at 3. As the ALI explains, “relitigation is considered a failure of adjudication and often is limited by a strict modification standard.” Id. The ALI acknowledges that in practice “courts are often reluctant to enforce a dysfunctional custody order, notwithstanding the legal barriers to its modification.” Id. at 4. The issue of course is the threshold requirement to establish a “dysfunctional” custody arrangement, rather than the principle that children should be removed from dysfunctional environments. If “dysfunctional” is very narrowly defined to extend, for example, only to cases of physical abuse, custody orders will be final except in extraordinary cases. In its proposed model, the ALI accords substantial deference to the child’s preference, authorizing modification to accommodate the firm and reasonable preference of a mature child. See ALI PRINCIPLES, supra note 3, § 2.16(2)(c).
in their environment. Consequently, once the custodial parent has established a home with the child, the noncustodial parent faces an enormous burden in attempting to upset that environment.

_Palmore v. Sidoti_ provides a notorious example of the intractability of the continuing norm. The _Sidoti_ story began with a divorce decree awarding custody of a three-year-old child to her mother. The father subsequently obtained a modification order, on the dubious ground that the mother’s cohabitation and later marriage to a man of another race was not in the best interests of the child. The mother appealed, ultimately to the Supreme Court, which reversed the trial court modification, finding its racial basis constitutionally impermissible. While jurisdictional issues delayed a new custody hearing, the mother petitioned a Florida court to order the child’s return to her custody. The court refused. Seeking to protect the child from “substantial upheavals of her life,” and observing that she had been living with her father for two and one-half years, the court ordered the child to remain with her father pending a new hearing. “A child custody suit,” stated the court, “is not a game to be played for the benefit of either parent.” For the _Sidoti_ mother, winning the constitutional battle thus did not guarantee her victory in the custodial war. Once lost, custody may be difficult indeed to regain, even when the initial order was improper. The continuity norm, together with the practical reality that some parents cannot afford to pursue an appeal or modification, magnifies parents’ stake in the initial custody outcome.

The parental claim to due process protections is not foreclosed by the private nature of custody litigation. While the classic procedural due process case involves a State action against an individual who seeks procedural protections against the State, the Court has applied due

162. See _EULLMAN ET AL., supra_ note 18, at 704 (noting the “widely held view that a child’s interest is best served by stable custody orders”); see, e.g., _MICH. COMP. LAWS ANN. § 722.23(d)_ (listing among the factors relevant to custody, “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity”); _id. § 722.27(1)(c)_ (“[C]ourt shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.”).


164. _Id._ at 430.

165. _Id._

166. _Id._ at 433–34.


168. _Id._

169. _Id._ at 847.

170. _Id._

171. See, e.g., _Eldridge_, 424 U.S. 319 (defendant seeks evidentiary hearing prior to termination of social security benefits); _Lassiter_, 452 U.S. 18 (indigent mother seeks counsel in proceeding for termination of parental rights).
Swords in the Hands of Babes

process requirements to a paternity dispute between private parties. In that case, Little v. Streater,172 the Court emphasized, however, that the pervasive State involvement in the case distinguished it from "a common dispute between private parties."173 Since custody litigation is inherently a private dispute, parental due process protections may thus depend on the extent of State involvement in the case. This involvement is pervasive indeed. Stepping into the litigation in its parens patriae capacity, the State searches out the child's best interests, undeterred by norms of family privacy, and engaging the child in a private conversation from which parents are excluded. Indeed, the gravamen of parents' due process complaint is that the State has gone too far in its engagement, unfairly apprising itself of information in-camera which it refuses to disclose. Under these circumstances, the private origin of the custody dispute makes procedural protections no less imperative.174

In sum, custody litigation imperils parents' fundamental right to enjoy their children's companionship and to direct their children's upbringing. This peril is magnified by the difficulty of regaining physical custody once lost. The great weight of the parental liberty interest, together with the significant deprivation of that interest inherent in a loss of physical custody, entitles parents to custody procedures that meet the requisites of due process.

B. What Fairness Requires

"'Due process,' unlike some legal rules, is not a technical conception with a fixed content,"175 but rather a flexible phrase that "calls for such procedural protections as the particular situation demands."176 Due process essentially "expresses the requirement of 'fundamental fairness,'"177 which entitles parties risking deprivation of fundamental

172. 452 U.S. 1 (1981). Little involved an indigent mother's state-compelled paternity action against an indigent defendant who claimed a right to a state-funded blood test. Id. at 3. Applying Eldridge, the Court determined that the state's refusal to fund the test violated procedural due process. Little, 452 U.S. at 16.

173. Id. at 9.

174. At least one state court has subjected in-camera custody interviews to due process scrutiny. See generally Molloy, 637 N.W.2d at 806-09 (applying Eldridge to determine legitimacy of confidential in-camera custody interview). For a discussion of Molloy, see infra notes 221-24 and accompanying text.


177. Lassiter, 452 U.S. at 24.
liberty interests to an opportunity to be heard “at a meaningful time and in a meaningful manner.”

Whether fundamental fairness entitles parents to an opportunity to challenge their children’s in-camera statements depends on the Supreme Court’s test of procedural due process, set out in *Mathews v. Eldridge*. This test requires a balancing of three factors: (1) “the private interest that will be affected by the official action”; (2) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”; and (3) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”

1. THE PRIVATE INTEREST AT STAKE

Parents have a fundamental liberty interest in “the companionship, care, custody and management” of their children. In *Troxel*, a plurality of the Court recently signaled the significance and breadth of this parental interest by recognizing that it may be impermissibly infringed by a grandparent visitation order to which a parent objects. The Court’s statement that a parent’s right to determine third party visitation is a significant-enough aspect of parental rights to trigger constitutional protection suggests the gravity of a noncustodial parent’s loss. If the loss of power to determine grandparent visitation is constitutionally significant, how much more so is a parent’s lost power to control her children’s upbringing and to determine the extent of her companionship with them. The noncustodial parent’s loss is significant indeed.

Although both parents risk a substantial reduction of their parental rights, neither parent’s rights can determine the custody outcome, for when two fit parents compete for custody, both parents assert *Troxel*-parent rights. Because each parent’s interest is the legal equivalent of the other

178. See *Armstrong*, 380 U.S. at 552; see also *Little*, 452 U.S. at 5-6 (“[P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” (internal quotation marks omitted) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)).
179. 424 U.S. at 335.
180. *Id.*
181. *Santosky*, 455 U.S. at 758; see supra Part II.A.
182. 530 U.S. at 72. Although *Troxel* was a substantive due process case, its significance to a procedural due process issue lies in its reaffirmation of the importance of the parental interest and in its recognition that this interest protects a parent’s right to control her child’s contact with third parties. *Id.* at 67.
183. *Id.*
184. For this notion of *Troxel*-parent status, I am indebted to my colleague Mae Kuykendall, Professor of Law, Michigan State University, DCL College of Law.
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parent’s interest, each interest offsets the other, leaving only the child’s interest to determine custody.185 Neither parent can thus claim a right to custody that is not in the child’s best interests, a conclusion that is consistent with the normative principle that good and noble parents seek the best interests of their children, even at great cost to themselves.186 During litigation, each parent thus has an interest in a custody decision that protects her parental rights, reducing those rights only to the extent necessary to ensure her child’s best interests.187 Because parents’ rights thus depend on a determination of the child’s best interests, parents have a commanding interest in ensuring the “accuracy and justice” of that determination,188 an interest that is not served when a judge bases custody on children’s unverified and likely untrustworthy statements.189

2. THE STATE’S INTEREST

Under the Eldridge due-process equation, the parental interest in accessing in-camera statements must be balanced against the State’s countervailing interest.190 The State’s general interest in custody litigation is twofold. First, the State seeks fiscal and administrative efficiency,191 aiming to make custody decisions as economically as possible and to avoid any unnecessary expense. In the case of in-camera interviews, the fiscal

185. See Andersen, supra note 26, at 937, 951; see also In re Baby M, 537 A.2d 1227, 1256 (N.J. 1988) (“[Because] the claims of the natural father and the natural mother are entitled to equal weight . . . the child’s best interests determine custody.”) (footnote omitted).

186. The Troxel Court’s deference to parental decision-making was grounded in the long-standing presumption that fit parents act in the best interest of their children. “‘Natural bonds of affection,’” said the Court, “‘lead parents to act in the best interests of their children.’” Id. (quoting Parham, 442 U.S. at 602). During custody litigation, however, parents may not actually have their children’s best-interests at heart. See supra Part I.B.1.a.

187. Professor Kandel has argued, however, that neither children nor their parents have an independent constitutional right to a best-interests custody decision, “although the goal of granting custody in the best interests of the child is a substantial government interest.” Kandel, supra note 33, at 349, 351.

188. See Lassiter, 452 U.S. at 27 (recognizing “[a] parent’s interest in the accuracy and justice of the decision to terminate his or her parental status”).

189. See Lombard, supra note 8, at 817 (reporting “a substantial probability that judges receive inaccurate information” during in-camera interviews, based on a survey of Michigan judges).

190. See Eldridge, 424 U.S. at 334–35.

191. The State’s interest in efficiency is a standard part of the Eldridge balancing test. Id. at 348 (“At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.”); see also Lassiter, 452 U.S. at 28 (noting the State’s pecuniary interest in parental termination proceedings); Little, 452 U.S. at 14 (noting the State’s “financial concerns”).
and administrative costs of procedural safeguards are likely to be insubstantial. Providing parents with a videotape of the interview, for example, would be relatively inexpensive, especially in view of the brevity of the typical in-camera conversation. The State’s pecuniary interest is therefore weak.

The State has a much more weighty “parens patriae interest in preserving and promoting the welfare of the child,” who is profoundly affected by the disintegration of her family and in great need of the State’s protection. The State’s parens patriae mission is twofold: (1) guard the child’s ultimate well-being by ensuring the accuracy and justice of the best-interests determination; and (2) shield the child, as much as possible, from the immediate trauma of custodial battle.

While parents may in principle share the State’s concern for the child’s best-interests, in practice parents’ best-interests motivation may be compromised “by feelings of loss, anxiety, guilt and anger” during the custody conflict that lead them to prioritize their own interests over the interests of their children. Because parents fighting for custody do not

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192. For a review of additional safeguards protecting parents, see infra Part II.B.3.

193. Santosky, 455 U.S. at 766; see also Lassiter, 452 U.S. at 47 (Blackmun, J., dissenting) (observing that State has “a legitimate interest in promoting the physical and emotional well-being of its minor children”).

194. See Gould, supra note 5, at 3 (“[Children’s] lives are profoundly altered by the anger, disappointment, and failure that characterizes their parents’ marital breakdown.”).

195. See ALI Principles, supra note 3, § 2.02 cmt. b (“[W]hen a family breaks up, children are usually the most vulnerable parties and thus most in need of the law’s protection.”).

196. The State’s responsibility to children caught up in custody battles is rooted in a counterpoint of traditional notions of childhood as a protected status, and more contemporary notions of children as individuals with increasing autonomy. See supra Part I.A.

197. Actually, the best-interests custody model inherently assumes the contrary, that is, that one of the parents is not actually the child’s “best” custodian and is therefore not acting in the child’s best interests in demanding custody, an assumption averted only in joint custody outcomes. For a view that there is actually no “best” custodian and therefore no “right” answer to the custody question in disputes between two fit parents, see generally Elster, supra note 2, at 12–16. For a brief critique of the best-interests model, see infra Part III.

198. ALI Principles, supra note 3, § 2.08 cmt. b. As the ALI explains: [E]xpectations and preferences are often complicated at divorce by feelings of loss, anxiety, guilt, and anger—feelings that tend not only to cloud a parent’s judgment and ability to make decisions on behalf of the child, but also to exaggerate the amount of responsibility a parent wants to assume for a child, or the objections he or she has to the other parent’s level of involvement in the child’s life.

Id. For a discussion of the efforts of parents to manipulate their children in order to win the custody battle, see supra Part I.B.1.b.(i).
reliably seek their children’s best interests, the State’s assertion of those interests on behalf of the child is critical. 199

While the State’s intervention on behalf of the child is essential, it may not be sufficient, for the State’s concern for the child is not as strong or as exclusive as the child’s interest in herself. Because the State’s interests are plural and diverse, its interest in the well-being of a particular child may be overridden by other important interests. 200 To take a simple example, an individual child might benefit significantly from long-term, state-funded counseling, which the State deems too costly in view of the huge number of children of divorce, and the more acute needs of other children who perhaps have suffered physical abuse. Although there will usually be no dramatic substantive clash between the interests of the child and those of the State, the State cannot fully represent the child’s interest. It is essential therefore that the State empower children to speak for themselves. 201

Giving children a voice in the vital issue of their custody furthers norms of fundamental fairness, 202 and also enhances the information gathering necessary to best-interests decision-making. Children may be valuable sources of information not otherwise available, and their conversation may alert a judge to important issues that require further exploration. Obtaining a first-hand account of the child’s perspectives, voluntary preferences, and other information she considers important may contribute significantly to a determination of what is best for her. Giving children an opportunity to speak in their own voice thus furthers the State’s interest in an accurate and just custody decision, a goal shared by parents and by the child herself.

199. A good argument can be made that the child’s interest ought to be considered as a separate private interest in family disputes. See, e.g., Troxel, 530 U.S. at 86 (Stevens, J., dissenting):

Cases like this [visitation dispute] do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child’s best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the [grandparent visitation] statutes applies—the child.

To include the child’s interest as a separate private interest in the Eldridge due process equation, however, would transform this simple balancing test into a much less orderly, multivariate test, requiring a balancing of each private interest against the State’s interest and also against the interest of the other private party. In an effort to preserve the powerful simplicity of Eldridge without harming the vitally significant interests of the child, this Article includes the child’s interest within the State’s parens patriae interest.

200. For this point I am indebted to Professor R. George Wright, Professor of Law, Indiana University-Indianapolis School of Law.

201. As previously discussed, the child’s interest in speaking freely is not synonymous with an interest in controlling the custody outcome, which some children will experience as burdensome rather than empowering. See supra Part I.B.1.a.

Some children, who are able and willing to speak openly, require only
that someone listen. For other children, however, the ability to speak
depends on the availability of a safe environment, far removed from the
traumatic atmosphere of the court room.\textsuperscript{203} In-camera interviews attempt to
offer children this safe haven and thus to further the State's interest in
shielding children, as much as possible, from the custody conflict.\textsuperscript{204}

The State's interest in sheltering children from immediate trauma,
however, conflicts with parents' interest in an opportunity to challenge the
accuracy and reasonableness of their children's in-camera statements.
Indeed, the State's interest in protecting children's immediate well-being
conflicts with the State's additional interest in children's ultimate well-
being, since untested information obtained in-camera may inspire an
erroneous determination of the child's best interests.\textsuperscript{205} Partial escape from
this conundrum requires adoption safeguards that reduce the risk of
erroneous factfinding at the least possible cost to children's immediate
well-being.

3. PROCEDURE RELIABILITY

The final factor in the \textit{Eldridge} due-process equation is "the fairness
and reliability of the existing . . . procedures, and the probable value, if
any, of additional procedural safeguards."\textsuperscript{206} Procedural due process
requirements "are shaped by the risk of error inherent in the truth-finding
process."\textsuperscript{207} As previously discussed, in-camera interviews are not reliable

\begin{itemize}
\item 203. While the proposition that children should have a voice in their custody
suggests a view of children as autonomous individuals, the concern that children not be
subjected to open testimony suggests a view of children as members of a protected status.
As children's socio-cognitive development progresses, the balance between these two views
of childhood alters, so that the state's urgent interest in protecting very young children from
the process trauma of open testimony is much diminished in cases of adolescents, who are
thought to be less needful of \textit{parens patriae} protection and better able to assert their rights as
autonomous players.

\item 204. For a discussion of process costs that even the State's best efforts cannot
eliminate, see \textit{supra} Part I.B.1.a.

\item 205. The sometimes competing State interest in protecting children and in ensuring
accurate fact-finding in the context of child protection proceedings is helpfully portrayed by
the Supreme Court of Michigan:

\begin{quote}
Although the fiscal or administrative burden of allowing respondents' counsel to
cross-examine the child may be slight, the governmental interest in protecting
her from trauma is significant. Furthermore, the state's interest in protecting
the child is impeded by error in the factfinding process. Therefore, the
procedure designed by the probate court to secure the most accurate testimony
furthers the governmental interest in protecting the welfare of the child.
\end{quote}

\textit{In re Brock}, 499 N.W.2d 752, 758 (Mich. 1993).

\item 206. \textit{Eldridge}, 424 U.S. at 343.

\item 207. \textit{Id.} at 344.
\end{itemize}
fact-finding tools, since children are apt to convey inaccurate information and to state unreasonable preferences. If the interview is kept confidential and the judge relies on the child’s statements, the risk of an erroneous custody decision is substantial. States have experimented with a variety of procedures to reduce this risk of error: (1) requiring a record of the interview; (2) allowing counsel to attend the interview; (3) enlisting experts to conduct the interview; and (4) limiting the scope of the interview. The probable value of each of these safeguards is considered here.

a. Requiring a Record

The practice in most states is to require a record of the in-camera interview. The form of this record may vary from a videotape, audiotape, or transcript, to a judicial summary. While the fiscal cost of a record is likely to be insubstantial, given the brevity of the typical interview, its efficacy in ensuring accurate fact-finding depends on its accessibility to would-be challengers. What is the judge to do with the record? Release it to parents? To parents’ counsel, perhaps with an instruction not to share it with parents? Should the record be made

208. See supra Part I.B.1.b.

209. For an overview of analogous cases involving attempts to shield child witnesses from defendants in criminal abuse cases, see generally, Marsil et al., supra note 44 (discussing various procedures including “placing a screen between child witnesses and the defendant during testimony; transmitting children’s testimony into courtroom by closed-circuit television; and admitting children’s . . . videotaped interviews” into evidence (citations omitted)).

210. ALI PRINCIPLES, supra note 3, § 2.14 cmt. a. In some states, a written record is statutorily required. See, e.g., COLO. REV. STAT. ANN. § 14-10-126(1) (West 1997 & Supp. 2002); 750 ILL. COMP. STAT. ANN. 5/604(a) (West 1999); KY. REV. STAT. ANN. § 403.290(I) (Michie 1999); MO. ANN. STAT. § 452.385 (West 1997); MONT. CODE ANN. § 40-4-214 (2001); VT. STAT. ANN. tit. 15, § 594(c) (2002); WASH. REV. CODE ANN. § 26.10.120 (West 1997). In some states a written record depends on a party’s request. See, e.g., KAN. STAT. ANN. § 60-1614 (Supp. 2001); OKLA. STAT. ANN. tit. 43, § 113(C) (West 2001 & Supp. 2003); TEX. FAM. CODE ANN. § 153,009(d) (Vernon 2002).

211. See ALI PRINCIPLES, supra note 3, § 2.14 cmt. a; see also Molloy, 637 N.W.2d at 811 (requiring a record, but leaving “[t]he manner of recordation of the interview, e.g. stenographic, tape, or video . . . to the discretion of the trial judge”). This part of the Molloy opinion was vacated by the Supreme Court of Michigan. Molloy, 643 N.W.2d at 574. In an earlier draft of the Principles, the ALI noted by way of comment that a written summary of the interview would not satisfy a record requirement since “it leaves too much room for misinterpretation and error.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.16 cmt. a (Tentative Draft No. 3 1998) [hereinafter ALI PRINCIPLES DRAFT NO. 3]. This provision, along with a record requirement, was deleted from the ALI’s final draft. See ALI PRINCIPLES, supra note 3, § 2.14.

212. See supra note 60 and accompanying text.
available during the proceedings or only on appeal? Should only the appellate court have access? Unfortunately, the ALI offers no guidance on these questions, having deleted from its final draft of the Principles an earlier recommendation that a record be made of the interview but kept confidential except for purposes of appeal. 213

The difficulty of a record requirement is that, even as it promotes truthfinding by exposing children's statements to parental challenge, it compromises the child's privacy and perhaps her ability to speak freely. If, for example, parents were given a videotape of an in-camera conversation during custody proceedings, they would gain a valuable opportunity to mold their arguments in response, challenging the accuracy of their child's statements of fact and the reasonableness of her preference. Since parents are singularly well-positioned to shed light on the intimacies of family life and therefore on the child's perspectives, this parental opportunity would tend to enhance truth-finding. From the child's perspective, however, this enhanced truth-finding would exact a huge price. Drawn deeper into the custody war, children would be the target of parents who are angry, hurt, and threatened by their statements. In effect, releasing a record to parents places children on a virtual witness stand, exposed to the very trauma in-camera interviews are designed to protect against. 214 Especially for children who are coaxed in camera to express a preference they have not publicly stated, parental access to children's' private statements can increase process costs for children and leave them with an enormous sense of responsibility, guilt, and regret. 215

For some children, the prospect of parental access to their statements will chill their ability to speak freely. Assuming fair play requires a trial

213. See ALI Principles Draft No. 3, supra note 211, § 2.16 (“A transcript, videotape, or other reliable means of recording the complete interview shall be made part of the record of the proceedings, and should be confidential except for purposes of appeal of the court’s order.”). In its adopted version, the ALI acknowledges, in a comment, that “[t]he practice in most jurisdictions is to require a . . . record[.]” although the Institute takes no position on the soundness of this practice. See ALI Principles, supra note 3, § 2.14 & cmt. a.

214. As one court explained its decision to decline to impose a record requirement, “the potential for misuse of the recorded statement, which was given in confidence by a distraught child, far outweighs any possible benefit to the parent's right to appeal.” Lesauskis v. Lesauskis, 314 N.W.2d 767, 769 (Mich. Ct. App. 1981). Professor Jones agrees. See Jones, supra note 61, at 81 (arguing that requiring a record deprives children of “freedom and privacy to tell the judge anything he or she wishes without fear that the child’s parents will learn what the child has said and consequently reject or punish him or her”).

215. For a discussion of these and other outcome costs, see supra Part I.B.1.c. Dean Lombard suggests, however, that in some cases, children may be as burdened by secrecy as much as by disclosure. Lombard, supra note 8, at 834. “A six to ten year old child,” she reasons, “might feel overwhelmed at the burden of keeping the awful secret that she revealed to the judge—that she preferred one parent to the other.” Id.
judge to inform children that their conversation will be recorded, some children so informed will choose not to speak at all, or to speak only guardedly. The result may be a distorted, less compelling version of the child’s voice, and a loss of valuable information and perspectives relevant to the child’s best interests that are not elsewhere available.

As an alternative to a full record, the judge might disclose to parents only the questions she intends to ask, but keep the child’s responses confidential. While this option superficially appears to protect children, it would in practice subject them to significant costs as parents press children for answers withheld by the court. Once again, children would be thrust into the center of the custody war zone.

Perhaps children could be better protected if the record were made available only on appeal, and then only to the appellate court. While this restriction would go far in protecting children from process stress, it would offer little protection to parents, who would have no opportunity to challenge, explain, or contextualize the child’s statements. Accuracy testing would thus depend not on the child’s parents, who are well-positioned to spot error, but on appellate judges, who are far removed from the child. Moreover, the appellate court’s invitation to assess the trustworthiness of the child’s statements depends on the parents’ ability to fund an appeal, an expensive proposition that parents may simply be unable to afford. Parents unable or unwilling to await appellate intervention would be sorely tempted to coax information about the interview from the child, a possibility that less formally but just as decidedly thrusts the child onto the virtual witness stand.

Seeking to reduce the risk of an erroneous decision while protecting children’s immediate welfare, a Michigan court recently struck a three-part compromise: (1) require a record of the in-camera interview; (2) make

216. See Jones, supra note 61, at 81 (arguing that the child’s privacy and the integrity of the judicial process mandate that the judge inform the child, prior to their conversation, that the interview will be recorded). Professor Jones suggests that the child be given an opportunity to object to the recording and decline the interview or decline to answer particular questions. Id.

217. But see Lombard, supra note 8, at 835 (observing that this possibility is “difficult to evaluate” and that the impact of a recording may vary with the age of the child).

218. ALI PRINCIPLES, supra note 3, § 2.14 cmt. b (“[T]he child may have a useful perspective on such matters that others cannot provide.”).

219. Jones, supra note 61, at 80; see also infra Part II.B.3.b. (discussing the comparable option of allowing parties or their counsel to submit questions to the judge).

220. Professor Jones warns that while this option initially seems attractive, it rests on the dubious assumption that appellate judges are more capable of evaluating the child’s interview, even at arm’s length, than the trial judge. Jones, supra note 61, at 83–84. She ultimately concludes that the costs of a record outweigh the benefits and opposes a record requirement. Id. at 84.

221. Molloy, 637 N.W.2d at 810.
the record available to an appellate court;\textsuperscript{222} and (3) allow parties access to information in addition to preference that "affects the custody decision."\textsuperscript{223} The third prong of this test, of course, is the 800-pound gorilla. Since children frequently volunteer information during in-camera interviews,\textsuperscript{224} Michigan judges who privately interview children will frequently be required to determine whether any of the child’s statements in addition to preference might affect or will affect the custody decision.\textsuperscript{225} This is no easy task, given the open-ended statutory laundry list of factors relevant to custody and the court’s broad discretion to determine what is “best.” The conscientious judge will carefully consider the possibility that the child’s statements have influenced her while striving to protect the child’s confidence whenever possible, a process that adds new administrative burdens to an already burdensome task. The more risk-averse judge will simply make the record available to parents in all cases, except the virtually inconceivable ones in which none of the child’s statements could possibly affect the custody decision. While the Michigan court’s struggle to balance the interests of parents and children is laudable, in practice it may simply be a disguised open-record requirement.

In sum, while a record requirement offers significant safeguards against fact-finding errors, it significantly compromises the child’s immediate well-being. However, given the peril to both parents and children posed by a custody decision based on erroneous fact-finding, Eldridge favors some form of record requirement unless an alternative

\textsuperscript{222} Id. The court did not specify to whom the record should be made available on appeal, stating only that such a record “is necessary for purposes of meaningful appellate review and to ensure the integrity of the custody decisions.” Id.

\textsuperscript{223} Id. at 811. Curiously, the court stated this critical test for parental access to the record in three different ways: (1) “We also require that the record . . . be made available . . . if the interview affects an additional child custody factor and that information makes a difference in the outcome of the case.” Id. at 805 (suggesting the \textit{entire record} be made available if information had an \textit{actual impact on the custody outcome}); (2) “when information affecting another best interest factor . . . is obtained in an \textit{in camera} meeting with the judge and may affect the court’s decision, a copy of the record must be made available to the parties so that the parties are afforded an opportunity to refute or challenge the veracity of the information obtained.” Id. at 810-11 (suggesting the \textit{entire record} must be made available if information has a \textit{potential impact on the custody outcome}); and (3) “if the information provided in the \textit{in camera} setting does exceed the scope of preference to the extent that it affects the custody decision, then the trial court must permit parties access to the record and the opportunity to be heard.” Id. at 811 (suggesting only the \textit{relevant portion of the record} must be made available if information had an \textit{actual impact on the custody outcome}).

\textsuperscript{224} See id. at 808 (“[I]n the process of determining a child’s preference a judge frequently learns additional information that could influence the decision-making process.”).

\textsuperscript{225} The \textit{Molloy} opinion suggests both of these tests in different parts of its opinion. See supra note 223.
safeguard can protect against error at less cost to the child’s immediate well-being.

b. Including Counsel

Some states require a court to permit counsel to attend the in-camera interview. Including attorneys in the interview gives parents indirect access to the child’s significant statements, thereby allowing parents an opportunity to challenge or otherwise limit the impact of those statements. The administrative costs to the State of such a safeguard would be minimal, requiring notification and incidental accommodations to attorneys.

The presence of counsel, however, might have a chilling effect on the child’s ability to speak freely to the judge. Lombard reported that most judges in her survey declined to include attorneys in the interview out of concern that the child would respond to the increased formality “by refusing to reveal anything to the judge that she did not wish her parents to know.” Especially for judges inclined toward casual courthouse-step conversations with children, inclusion of counsel would transform the nature of the conversation, discomforting both child and judge, and compromising its usefulness in eliciting valuable information.

In an apparent attempt to balance concern for the child’s interest with the parental interest in access to information, some states allow counsel to observe the interview, but prohibit their participation, evidently on an assumption that the silent attorney is less intimidating to the child than the vocal one. The impact of the scary attorney might also be reduced by a judicial instruction, delivered in the presence of the child, that the attorney not share with parents information obtained during the interview.

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226. See, e.g., 750 ILL. COMP. STAT. ANN. 5/604(a) (West 1999); MO. ANN. STAT. § 452.385 (West 1997).

227. See Jones, supra note 61, at 79 (“[I]n the presence of strangers the child may be less likely . . . to talk honestly and openly with a judge.”).

228. Lombard, supra note 8, at 813. In the words of one judge, if you allow attorneys “you might just as well put the kid on the stand.” Id. Lombard found, however, that the presence of a court reporter did not appear to stifle the in-camera conversation. Id. at 825.

229. See Scott et al., supra note 30, at 1058–59 (reporting that while some Virginia judges allowed attorneys to attend the interview, few permitted parents’ attorneys to take an active role). In an even more restricted version of the counsel option, attorneys might be permitted to watch the interview through a one-way window. See, e.g., In re Brock, 499 N.W.2d at 758 (methodology in child protective proceeding). To the extent judicial integrity requires the court to inform the child of this one-way mirror, the effect on the child would be similar to that of visible third parties and to a record, for the critical question for the child is whether Mom and Dad will know what she says, rather than how they will know.

230. For this insight I am indebted to Joan E. Young, Chief Circuit Judge, Oakland County Sixth Circuit Court, Michigan.
Assuming the already-insecure child believed the attorney would honor the judge’s instruction, the child’s perception of risk might thereby be reduced, although the fact of the instruction itself might signal the gravity of the interview to a child who did not previously comprehend it and therefore tend to increase rather than decrease her stress and thus her willingness to speak.

Another variation of the counsel option would exclude attorneys from the interview, but allow them to submit questions for the court to ask during the interview. This measure would seem to give parents some control over the information judges obtain from the child without compromising the child’s sense of safety. Although the ALI has endorsed this option, it may not be as innocuous as it initially appears. The potential for parental mischief is unmistakable as parents discover an opportunity to use children as conduits of strategic information they are coached to recite. “Tell me about your trip to Reno with Daddy,” reads the trial court’s cue card. What follows is a child’s well-rehearsed narrative of Dad’s gambling, drinking, and cavorting, all carefully scripted by Mom. While the story may or may not be credible, the dad who is unaware of it cannot challenge it. Unfortunately, the attractiveness of this opportunity to use children as pawns may prove too tempting for some parents to resist.

c. Deferring to Experts

The ALI authorizes judges who feel “uncomfortable” interviewing children to delegate the interview task to someone else. If this delegate is a social worker or other experienced child-care worker, her skill may
produce better interview results, that is, more reliable information at less cost to children. At least that's the theory.

In practice, as Professor Fineman has observed, "social workers are not neutral" and may inject a professional bias into the interview that disadvantages mothers.\footnote{Fineman, supra note 3, at 730.} Allowing experts to replace judges might further impede fact-finding by foreclosing judges from an opportunity to direct the interview toward factors legally relevant to custody.\footnote{See Jones, supra note 61, at 73.} Judges would acquire information second hand,\footnote{Use of an expert as a middle-person between child and judge also invites communication errors, although allowing judges to view a videotape of the interview would reduce these communication costs. \textit{See} Jones, \textit{supra} note 61, at 73.} losing the opportunity to respond interactively to the child's statements and demeanor. Interjection of experts into the dispute may also exacerbate the parties' hostilities, compromising the success of post-divorce custody arrangements.\footnote{See \textit{ALI PRINCIPLES}, \textit{supra} note 3, § 2.08 cmt. b ("Avoiding expert testimony is desirable because such testimony, within an adversarial context, tends to focus on the weaknesses of each parent and thus undermines the spirit of cooperation and compromise necessary to successful post-custody arrangements . . . ").} Moreover, even when an expert succeeds in producing more accurate information than a judge, that information will not be free of information risks, and therefore must undergo some form of accuracy testing.\footnote{Dean Lombard would require the expert to file a report with the court, which would be made available to the parents who would then have an "opportunity to cross-examine the expert." Lombard, \textit{supra} note 8, at 840–41.} On balance, the expert-interviewer option may simply compound the fiscal costs of conversations with the child\footnote{In a worst-case scenario, the parent who discovers a child has made statements unfavorable to her custody claim would hire a new expert to conduct a "more skillful" interview designed to produce "better" answers, at, of course, additional cost. \textit{See id.} at 842. "Success" in this subsequent expert interview would then tempt the other parent to initiate yet another expert interview, a response repeated until the judge calls a time-out to protect the child from subsequent interviews. \textit{See id.} This scenario of course assumes the parental resources necessary to bear the costs of expert interviews; if parents are disparately positioned, so that only one parent has access to subsequent experts, the other parent may be at an unfair strategic disadvantage.} without eliminating the need for subsequent accuracy testing.

In a variant of the expert-interviewer option, judges might themselves be trained in cognitive development theory in order to better equip them to gauge the child's maturity\footnote{See, e.g., Jones, \textit{supra} note 61, at 72–73 (arguing that judges should have "at least a basic knowledge of child development principles" to enable them to know "what questions to ask in eliciting the needed information, how to ask those questions in order to receive accurate answers, and how to interpret the child's responses"); Mlyniec, \textit{supra} note 76, at 1906–08 (urging training for family-court judges, but concluding that preference should not be determinative unless a third party interviews the child).} and the accuracy and reasonableness of her
statements. Some limited judicial training is no doubt prudent. But the kind of extensive training necessary to equip judges with expert interview skills would impose significant fiscal and administrative costs on the State with no guarantee that judges would thereafter reliably eliminate information risks or the need for subsequent testing of the child’s statements.

d. Limiting the Scope of the Interview

A final safeguard that might protect parental rights without compromising the child’s ability to speak would limit the scope of the in-camera interview, authorizing the judge to inquire only into the child’s preference and nothing more. The simple underlying theory is that if less information is obtained, there is less opportunity for untrustworthy information to affect the custody outcome.

The problem with this approach, however, is that it won’t work. Indeed, as the Michigan court adopting this limitation observed, “in the process of determining a child’s preference a judge frequently learns additional information that could influence the decision-making process.” The court’s effort to determine whether the child’s preference is reasonable, together with the advisability of indirect rather than direct questions ensures that most in-camera interviews will produce information in addition to preference even when the judge is not seeking it.

Moreover, a judge’s attempt to prevent children from discussing information in addition to preference that they consider important signals an unwillingness to listen and a disrespect for the child that may undermine her sense of value and satisfaction with the legal system. In addition to these costs to the child’s sense of significance, the scope limitation is inherently unwise, since success in gagging the child may deprive the court of important information. On balance, a scope limitation is unworkable, disrespectful, and imprudent.

4. ON BALANCE

The fundamental parental right to the care and companionship of children, reaffirmed in Troxel, gives parents a commanding interest in ensuring the accuracy and justice of the custody decision. Given the substantial risk that children’s in-camera statements will be inaccurate and

241. See Molloy, 637 N.W.2d at 808 (requiring that an in-camera “interview[] be limited to reasonable questions to discover the preference of the child”).
242. Id.
243. See ALI PRINCIPLES, supra note 3, § 2.08 cmt. f (“Generally speaking, the preferences of a child, even when relevant, should not be directly solicited.”).
unreasonable, fundamental fairness requires that parents be given an opportunity to challenge the child's statements that may lead a court to erroneously deny a parent's claim to physical custody. "[F]airness," as Justice Frankfurter observed, "can rarely be obtained by secret, one-sided determination of facts decisive of rights." The Eldridge balancing test thus favors providing parents with a record of the in-camera interview and allowing them an opportunity during the proceedings to challenge their children's statements. While this process would reduce the risk of erroneous decision-making, to the benefit of both parents and children, it would increase process and outcome risks for children, compromising the safety of the judge's chambers and subjecting children to reprisal from parents who are angered, threatened, or disappointed by their children's statements.

If the child's statements must be revealed to parents, as Eldridge suggests, it is imperative that the in-camera interview be restructured to decrease the risks to the child of such exposure. Children thus should not be asked, directly or indirectly, to express a preference that they have not previously and openly acknowledged, and they should never be coaxed into more extensive involvement in the custody battle than they might like through forced-choice questions, designed to flush out a preference that may not reliably exist apart from the child's eagerness to please the judge who presupposes the child has a preference. Rather, children should be given an opportunity for free narrative, allowing them to speak broadly to any issue they consider important, or not to speak at all. Nor should any preference the child chooses to express be given dispositive effect, since abdicating control of the custody decision to the child can burden her with an onerous sense of responsibility, guilt, and regret. Escape from the perils of preference-driven decision-making, however, may require retreat from the best-interests custody model that inspired it.

III. FROM THE MOUTHS OF BABES

I like children,—he said to me one day at table,—I like 'em and I respect 'em. Pretty much all the honest truth-telling there is in the world is done by them.245

The law's preoccupation with preference has muted children's voices. Judges searching out unexpressed preferences or struggling to verify the maturity and reasonableness of expressed preferences have less time to

listen to the things children think are important. This lost opportunity is significant, both for children who lose the freedom to speak to issues that concern them, and to legal actors who lose access to valuable sources of information and perspectives that others cannot provide. "Whom do you love most?" is the wrong question to ask children. The wise judge will instead ask, "Is there anything you want me to know?"

Given an opportunity for free narrative, some children will choose to talk about their hamsters, and some children will choose to say nothing. But other children will reveal unsuspected perspectives, critical instances of parental devotion, mistreatment, or even abuse. Other children will open doors leading to important information that would otherwise remain undisclosed. And some children will volunteer a strongly-held custodial preference. The point is that we do not know what children will say. If we do not invite children to speak, we may never know.246

The imprudent practice of devoting in-camera conversations to preference is less a product of uncaring judges than it is a pragmatic response to the inadequacies of the best-interests model.247 Using the

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246. Some children of course will blurt out information unrelated to custodial preference despite the judge's efforts to confine their conversation. These children, like more restrained children, however, deserve an invitation to speak broadly and may speak more extensively if so invited.

247. The best-interests custody model has long been criticized for its indeterminacy and unpredictability. See, e.g., Fineman, supra note 3, at 727; Mary Anne Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TUL. L. REV. 1165, 1181 (1986); Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 262 (1975). As the ALI recently observed, the best-interests test "tells courts what is best for a child, as if what is best could be determined and was within their power to achieve." ALI PRINCIPLES, supra note 3, at 2. Jonathon Gould describes the difficulty of this judicial task:

[J]udges, who are motivated by their sincere and passionate concern for social order and responsibility, are asked to render judgement about the best interests of the child despite not knowing the child. Theirs is the supreme balancing act, listening for information and relevant facts within a sea of game-playing, positioning and accumulation of irrelevant facts made to look important. Gould, supra note 5, at 4.

The best-interests standard has also been criticized for its tendency to generate costly and protracted litigation. See, e.g., Mnookin, supra, at 262. Incentives for strategic procrastination are built into custody litigation, as the parent with greater resources seeks delay in order to strike a more favorable settlement and the parent with temporary custody seeks delay in order to establish a stable environment with the child that will strengthen her custody claim. See Elster, supra note 2, at 23-24. Unfortunately, protracted litigation imposes tremendous emotional costs on children, who continue their painful role as "mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy." Id. at 24.

The best-interests standard has been further criticized for its tendency to inspire judges to rely on personal moral codes. See id. § 2.02 cmt. c ("When the only guidance for the court is what best serves the child's interests, the court must rely on its own values judgments . . . ."); BLACK & CANTOR, supra note 22, at 42 (observing that lack of guidance leads courts to rely on their "upbringing, biases, and, perhaps, irrationalities . . . [which is]
child’s preference as a proxy for her best interests has eased the daunting judicial task of assessing what is “best” for a particular child. Taking back the custody sword and reconceiving preference interviews as less-directed invitations to free narrative will leave judges once again without guidance in the tremendously difficult task of best-interests decision-making. Freeing children from the whom-do-you-love-most inquiry may therefore require correction of the inadequacies of the best-interests standard.

Professor Elster suggests flipping a coin as an improvement over the best-interests model in the ordinary case of two fit parents. Simple, equalitarian, and cheap, coin-flipping might indeed improve on the best-interests model. As Professor Elster concedes, however, basing custody on the flip of a coin imposes disproportionate costs on the more risk-averse parent, who is likely to be the parent more attached to the child. Fortunately, there is a better way.

In its recently promulgated Principles of the Law of Family Dissolution, the ALI refines the best-interests model by proposing that custodial responsibility be allocated in proportion to past caretaking. utterly without any necessary relation to what is best for the child in question”); Elster, supra note 2, at 14 (noting the best-interests standard invites trial courts “to add some preferences of her own”).

248. See BLACK & CANTOR, supra note 22, at 42–46 (identifying the “children’s-choice presumption” as a means of filling the void left by the best-interests standard).

249. Elster, supra note 2, at 40–42.

250. Id. at 42.

251. In the ALI model, “[c]ustodial responsibility refers to physical custodianship and supervision of a child.” ALI PRINCIPLES, supra note 3, § 2.03(3). The term denotes “what traditionally has been called child custody.” Id. § 2.08 cmt. a.

252. ALI PRINCIPLES, supra note 3, § 2.08(1) (“Unless otherwise resolved by agreement of the parents . . . . the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation.”). If no determinative caretaking pattern exists, then the ALI would revert to the best-interests standard. Id. § 2.08(3).

The ALI credits Elizabeth Scott with the approximation concept. Id. at 8 n.15 (citing Elizabeth S. Scott, Pluralism, Parental Preferences and Child Custody, 80 CAL. L. REV. 615 (1992)). This approach has much in common with the primary caretaker preference favored by some courts and commentators. See, e.g., Fineman, supra note 3. See generally ELLMAN ET AL., supra note 18, at 661–65. The rationale underlying a preference for the parent who has most extensively cared for the child is described in Garska. 278 S.E.2d 357. Garska suggests the primary caretaker may be identified by asking which parent performs the following duties:

(1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends’ houses or, for example, to girl or boy scout meeting; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night,
The underlying rationale for this approximation model is that the extent of past caretaking "correlates well with other factors associated with the child's best interests." The ALI's model offers a compelling alternative to the inadequacies of the best-interests standard.

Unfortunately, even as they acknowledge that "[g]iving great weight to the preferences of a child . . . can raise significant difficulties," the ALI incorporates into its model an over-reliance on the child's preference that reflects current practice. This deference to preference takes two forms. First, in cases in which the approximation model fails, the ALI reverts to a best-interests standard in which the child's preference is weighed according to the child's age, maturity, and reasonableness. This default position perpetuates the costly mistakes of current preference practices.

Secondly, the ALI abandons its approximation standard altogether in order "to accommodate the firm and reasonable preferences of a child who has reached a specific age." This age of maturity is left to state decision-making, but the ALI suggests in a comment that age "11, 12, 13 or even 14" might be appropriate. This preference exception poses significant

waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id. at 363.

The ALI draws an important distinction between "caretaking" and "parenting." While the former involves "interaction with the child," the latter involves a broader spectrum of activities, including "economic support," "maintaining or improving the family residence," "food and clothing purchases," and "other functions that are customarily performed by a parent or guardian and that are important to the child's welfare and development." ALI PRINCIPLES, supra note 3, § 2.03(5)-(6).

253. ALI PRINCIPLES, supra note 3, § 2.08 cmt b.

254. Id.


256. ALI PRINCIPLES, supra note 3, § 2.08 cmt. f.

257. The approximation model may fail in cases of newborns and in cases in which parents share caretaking equally. See id.

258. Id. § 2.08(3) & cmt. f.

259. Id. § 2.08(1)(b).

260. Id. § 2.08 cmt. f. Under the ALI model, the preferences of younger children would not be considered in any case in which the approximation standard applies. See id.
peril to children. Moreover, it is unnecessary under the ALI's own scheme.

Consider, for example, the case of the sixteen-year-old child whose mother has been her primary caretaker, but who openly and adamantly refuses to live with her mother, preferring her father, with whom she shares a greater emotional bond and perhaps more mutual interests. A custody order directing such a child to live with her mother would be unworkable, even harmful to the child, whose maturity enables her to pack up and leave her mother's residence on a daily basis, should she choose to do so. Assuming the fitness of both parents and the reasonableness of the child's preference, this case is clearly one in which preference ought to determine custody. But the ALI model already provides an escape from the approximation standard in such a case, without the need for a preference exception.

Among the ALI's qualifications on the approximation standard is a provision that past caretaking not be determinative when the effect "would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child." Another safety valve provides for departure from the approximation standard when necessary "to avoid substantial and almost certain harm to the child." The sixteen-year-old who refuses to live with her primary caretaker mother falls within one or both of these exceptions, as this child feels a grossly disparate emotional attachment to her father and the adamancy of her preference, together with her age, suggests she would experience substantial and almost certain harm if she were ordered to live with her mother. For less mature children whose preferences are less adamant, there is no compelling reason to abandon the determinacy of the approximation standard and many compelling reasons to refuse to do so, given the significant costs preference-based decision-making imposes on children generally. Past caretaking should thus determine custody except in extraordinary cases involving children near majority whose preferences are so fiercely held as to make arrangements inconsistent with that preference unworkable and therefore harmful.

If the ALI model were modified to depart from the approximation standard only in these unusual cases, the need to search out the child's preference would be virtually eliminated, since mature children with

261. The ALI acknowledges that "it is often unrealistic to expect a court-ordered arrangement to work well when an older child is firmly opposed to it." Id.
262. For a discussion of some of the circumstances that make preferences and their underlying affective bonds unreasonable, see supra Part I.B.3.
263. ALI PRINCIPLES, supra note 3, § 2.08(1)(d)
264. Id. § 2.08(1)(h).
265. See supra Part I.B.3.
strongly-held preferences will ordinarily reveal them without being asked.\textsuperscript{266} Actually cases involving mature children with strongly-held preferences are not likely to be litigated in the first place.\textsuperscript{267} In-camera interviews could thus be recast as opportunities for free narrative rather than as narrow invitations to express private preferences. So cast, in-camera conversations could serve to alert judges to information other than preference that makes the approximation standard inappropriate while empowering children to speak broadly rather than to the narrow issue of custodial choice.

IV. CONCLUSION

As Solomon understood, custody disputes ordinarily allow no easy answers. The difficulty of custody decision-making, however, is no excuse for abdicating the custody decision to children, who ordinarily are stressed by their entanglement in parental hostilities and often significantly burdened by responsibility, guilt, and regret over their role in the custody outcome. Children thus should not be asked to express a preference they have not volunteered, and their volunteered preference should not be made dispositive except in extraordinary cases.

These changes in current preference-based decision-making are critical in view of parental demands for access to children’s in-camera conversations. The \textit{Eldridge} due-process test suggests that parental claims are constitutionally legitimate in view of the fundamental nature of the parental right to custody and the substantial risk that a judge will base custody on a child’s inaccurate statements and unreasonable preferences. Parental access to children’s statements, however, increases the risk of these interviews for children, who may become targeted by parents who are hurt, angry, or threatened by their children’s statements to the judge. Avoiding in-camera preference questions and reducing the stakes of the interview by according preference a lesser role, will reduce these risks.

But more is required. To the extent over-reliance on the child’s preference is a response to the inadequacies of the best-interests custody model, that model must be repaired. The ALI offers a compelling new custody standard in its approximation model, which generally bases custody on past caretaking. The ALI’s deference to the child’s preference, however, should be rejected in favor of a rule that makes preference

\textsuperscript{266} ALI PRINCIPLES, supra note 3, § 2.08 cmt. f ("[C]hildren with firm preferences will find a way to make those preferences known without significant effort by those involved in the case.").

\textsuperscript{267} See BLACK & CANTOR, supra note 22, at 42 (noting that custody trials normally do not occur in cases "where the child has a pronounced preference and is near majority").
dispositive only in extraordinary cases in which a contrary custody arrangement would clearly be unworkable. While these changes would not transform custody disputes into easy cases, they would go far in injecting determinacy into custody decision-making and curtailing the dubious practice of placing the custody sword in the hands of babes.
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